

VOL. XVIII

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

-----  
UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION  
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the  
Honorable William M. Skretny, U.S.  
Courthouse, 2 Niagara Circle, Buffalo,  
New York on March 26, 2013.

APPEARANCES:

AARON J. MANGO,  
Assistant United States Attorney,  
ROCKY PIAGGIONE, Senior Counsel,  
U.S. Department of Justice,  
Appearing for the United States.

GREGORY F. LINSIN, ESQ.,  
JEANNE M. GRASSO, ESQ.,  
ARIEL S. GLASNER, ESQ.,  
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,  
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal  
Sheila Henderson, Paralegal

Michelle L. McLaughlin, RPR,  
Official Reporter,  
U.S.D.C. W.D.N.Y.  
(716) 332-3560

|    |                        |      |
|----|------------------------|------|
| 1  | I N D E X              |      |
| 2  |                        | PAGE |
| 3  | JURY CHARGE CONFERENCE | 3800 |
| 4  | SUMMATIONS             |      |
| 5  | Mr. Mango              | 3879 |
| 6  | Mr. Linsin             | 3928 |
| 7  |                        |      |
| 8  |                        |      |
| 9  |                        |      |
| 10 |                        |      |
| 11 |                        |      |
| 12 |                        |      |
| 13 |                        |      |
| 14 |                        |      |
| 15 |                        |      |
| 16 |                        |      |
| 17 |                        |      |
| 18 |                        |      |
| 19 |                        |      |
| 20 |                        |      |
| 21 |                        |      |
| 22 |                        |      |
| 23 |                        |      |
| 24 |                        |      |
| 25 |                        |      |

1 (Jury not present in the courtroom.)

2 THE COURT: Okay. Colleen, if you would  
3 call the case, please, just to get us on track  
4 here.

5 THE CLERK: Criminal case 10-CR-219,  
6 United States versus Tonawanda Coke and Mark  
7 Kamholz.

THE COURT: Okay. Let's see. The attorneys are all here representing the parties in the case, and we thought we'd have a continuation in order to finalize the charge conference and the charges. We're at the point where we were going to start with charge number 39. I thought we'd proceed in the same fashion that we did yesterday. I know in the defendants' submission basically the first charge that's addressed is 41. But does anybody want to bring up anything preliminarily?

18 MR. PERSONIUS: No, your Honor.

19 MR. MANGO: No, your Honor.

20 MR. LINSIN: No, your Honor.

THE COURT: Okay. All right. Proposed  
charge number 39, violations of the Clean Air Act.  
Hold on one second.

Okay. Hearing nothing, charge number 39 will  
be accepted. That runs from pages 54 through 67.

1           Okay. And then that takes us to charge number  
2 40, purpose of the statute. Hearing nothing,  
3 accepted. That's page 68.

4           Now we go to charge number 41, and that's the  
5 elements of the offense. Mr. Linsin?

6           MR. LINSIN: Thank you, your Honor. What  
7 we requested in our submission and what we believe  
8 is necessary in order to give clear guidance to the  
9 jury is that the Court break the Clean Air Act  
10 instructions out into three separate instructions  
11 to relate to the three groups of counts as we set  
12 out in our submission, Counts 1 through 5 to be  
13 addressed separately, Counts 6 through 10 to be  
14 addressed separately, and then 11 through 15.

15           We believe it important, in part, your Honor,  
16 because there are separate elements, in our view,  
17 as recited in the indictment, separate conditions  
18 in the permit that are referenced and that we  
19 believe should be referenced in the instruction.

20           And, as we've indicated, with respect to  
21 Counts 6 through 10, for the reasons we set out in  
22 our submission, we believe that there should be an  
23 additional element added to the list that is  
24 currently contained -- list of elements currently  
25 contained in draft charge number 41 relating to the

1 proof that there was no valid exemption in effect  
2 during the time periods referenced.

3 So we are asking that these be broken out, not  
4 in any way to complicate this charge, but to, we  
5 believe, provide proper guidance and clarity to the  
6 jury about what they must find with respect to each  
7 of the three separate Clean Air Act groups of  
8 counts.

9 THE COURT: Okay. I'm going to start out  
10 this way. It's a little difficult, I mean, not  
11 knowing the government's position because I still  
12 don't have that from the government. You know, one  
13 thing we do have, I think, is a jury that's  
14 engaged. So, you know, I think that's helpful in  
15 terms of the -- what we have to do with the charge,  
16 if anything.

17 But, Mr. Mango, what's -- what's your view with  
18 respect to the sufficiency of the charge as it now  
19 stands?

20 MR. MANGO: Yes, your Honor. We do  
21 believe it is sufficient, except for one change  
22 that would be recommended in the third element,  
23 which currently reads that "during the time periods  
24 alleged in the indictment the defendant operated or  
25 caused to be operated an emission source in

1 violation of the Title V operating permit." In the  
2 government's view, consistent with all 15 counts of  
3 the indictment, it actually -- the indictment reads  
4 that "the defendant operated or caused to be  
5 operated a stationary source in violation of a  
6 Title V operating permit requirement." That, I  
7 think, would get over the confusion of the fact  
8 that in condition 4 it's actually called an  
9 unpermitted emission source, and that in conditions  
10 96 and 97, those are the quench towers, and  
11 according to Mr. Linsin, those are not emission  
12 sources. We strongly disagree with the fact that  
13 Counts 6 through 10 need to have an additional  
14 element.

15 We did draft something, your Honor. It just  
16 didn't make it into final version to be ready to be  
17 e-filed. We could do that later this morning if  
18 you'd like. But it's our view that -- that these  
19 elements, with just that change, would be  
20 sufficient, and I don't think -- based on your  
21 comments, your Honor, this jury is going to follow  
22 you. And all 15 counts start out the same way.  
23 The Tonawanda Coke Corporation operated a  
24 stationary -- or the defendants operated a  
25 stationary source in violation of a Title V permit.

1       And there's no reason not to capture all 15 counts  
2       in one charge such as this, because all the  
3       elements are the same, in the government's view.

4           THE COURT: Yeah, I'm inclined to go that  
5       way. I don't think there's the necessity for the  
6       insertion of an additional element in the second  
7       grouping of counts that are proffered by the  
8       defendants.

9           But what's your position, Mr. Linsin, with  
10      respect to changing the third element from an  
11      emission source to a stationary source?

12           MR. LINSIN: Your Honor, I just, frankly,  
13      disagree with counsel's -- the stationary source  
14      language is captured in the first element of this  
15      instruction, and that is consistent with the  
16      introductory language in each of the 15 counts, and  
17      that's why we had no objection.

18           When we get down to the particularization of  
19      each of the groups, Count 1, for example,  
20      references a pressure-relief valve in the  
21      by-products department, comma, an unpermitted  
22      emission source. And then when you look to the  
23      parallel language in the other groups, it is a  
24      quench tower.

25           And so the language about a stationary source,

1       that is a necessary element. It is captured in the  
2       first element, as recited in this draft charge, but  
3       what it is that is actually charged as the  
4       violation, the particularization for each of these  
5       groups, in the language of the indictment in each  
6       of the counts speaks of, for Counts 1 through 5, an  
7       emission source. And we believe it is important  
8       that the jury be guided and that the -- that the  
9       requirement be clear that it be proven that it is  
10      an emission source.

11           As the Court will recall, we believe that there  
12      is a significant issue here as to whether the  
13      pressure-relief valve was, in fact, an emission  
14      source under the applicable regulations. And  
15      failing to capture that, glossing it over and  
16      repeating language of what is in the first element,  
17      I think misleads the jury as to what -- what the  
18      required elements are and what the allegations are  
19      in these counts.

20           THE COURT: In Counts 1 through 5?

21           MR. LINSIN: Counts 1 through 5. And then  
22      in 6 through 10 and, likewise, in 11 through 15,  
23      instead of an emission source, it is referenced as  
24      a quench tower, operation of a quench tower in  
25      violation of a condition of the permit.

1           And we see -- I'm surprised, your Honor, that  
2       the -- that the government would -- would oppose a  
3       clear statement of what is actually recited in this  
4       indictment. That is what they've charged. Making  
5       it clear that the instructions and the elements  
6       track what is alleged in these counts, I think  
7       is -- assists the jury, makes sure that the  
8       government is held to the proof that they have  
9       alleged in these counts, and, honestly, if -- if  
10      this current charge is -- were to be read by the  
11      jury in parallel with the language that is set out  
12      in each of these counts, I think there would be  
13      inevitable confusion, and this charge does mislead  
14      for that reason.

15           So we think, as I said, at a minimum these  
16      groups need to be particularized as to what is  
17      the -- either the source or the quench tower that  
18      is referenced; and we would also think -- believe,  
19      your Honor, that for that very reason it would be  
20      important to recite that in Counts 1 through 5 it  
21      is alleged that this -- the operation of this  
22      emission source was a violation of condition 4 of  
23      the permit. We see --

24           THE COURT: As opposed to just Title V.

25           MR. LINSIN: Exactly. And -- and then, in

1 parallel, for counts for the groups 6 through 10,  
2 condition 96; and then 11 through 15, condition 97.  
3 That's what is alleged. And I think it clearly  
4 will help the jury in focusing its attention. It  
5 is what is charged, and those charges should be  
6 reflected as part of the burden the government has  
7 in establishing these alleged violations.

8 I won't belabor the point, your Honor, with  
9 regard to this exemption for the second group  
10 there, 6 through 10, but I would point out that  
11 this is an issue that we addressed during the  
12 Rule 29 conference. It is clearly the theory upon  
13 which the government has tried this case, and I  
14 think exempting or removing that element which they  
15 have assumed as a burden in the course of trying  
16 this case, I think leaves the jury without any  
17 guidance as to what to do with all of this evidence  
18 that's been introduced about the exemption itself,  
19 about the percentage of uses of these towers.

20 If I try to put myself in the place of a juror  
21 and I look at this charge without any reference to  
22 this exemption or its applicability to these  
23 allegations for quench tower number 1, I think  
24 without a reference to that exemption the jury will  
25 be left without any clear guidance about what to do

1 with that evidence. And the government introduced  
2 it for a reason. They knew it was an issue with  
3 regard to these counts, and they now should be held  
4 to that by inclusion of that element in these  
5 counts.

6 THE COURT: By reference to the condition?

7 MR. LINSIN: By reference -- no, your  
8 Honor. By reference -- well, by reference to the  
9 condition, but by reference to the exemption that  
10 relates to that quench tower. It's quench tower  
11 number 1 in 6 through 10. That is an exemption  
12 they understood applied. There has been abundant  
13 evidence about this issue. Witnesses have been  
14 questioned repeatedly about the initiation of the  
15 exemption, about whether it was valid or not, about  
16 the percentage of the usage, and whether it had  
17 been voided. And now to leave the jury without any  
18 guidance about what to do, what to make of that  
19 evidence and how it relates to these counts, I  
20 think is -- is failing to hold the government to  
21 their required proof, but I also think would just  
22 lead to confusion.

23 So I think this is an element, your Honor, that  
24 the government has accepted as their burden on  
25 Counts 6 through 10, and we believe that should be

1 reflected as a necessary element, given the facts  
2 as presented throughout this trial.

3 THE COURT: But you can certainly argue  
4 that point.

5 MR. LINSIN: Well, your Honor, without  
6 clear guidance from the Court -- I can argue all  
7 day long. But if the Court then tells the jury,  
8 "Well, but that's not a required element," my  
9 arguments go up in smoke. It should be a required  
10 element. I can make reference to the exemption and  
11 whether it was valid, but if the Court does not  
12 clearly tell this jury the government's required to  
13 prove there was no valid exemption, the jury's  
14 going to think of these arguments as nothing but  
15 smoke on my part. And I don't believe that is a  
16 fair assessment of how the government has tried  
17 this case and -- or a fair assessment of the  
18 representations they made during the Rule 29  
19 discussion on this issue.

20 MR. MANGO: Your Honor, these arguments  
21 are -- seem to be identical to the Rule 29  
22 arguments, that this -- this is not an element of  
23 the offense. The conditions, which are in  
24 parentheticals in all of the counts, so the first  
25 five and a half lines of each of the counts are

1 identical, that they -- again they -- the  
2 defendants knowingly operated a stationary source  
3 in violation of its Title V permit requirements by,  
4 and then it gives specificity in each of the 15  
5 counts.

6 That language is identical, and that is what I  
7 believe can be captured in these four elements, and  
8 it's -- the fact that they're the owner or operator  
9 of the stationary source in the first element, that  
10 doesn't capture that they then operated that  
11 stationary source in violation of their permit.

12 And --

13 THE COURT: Do you have any problem with  
14 the language referencing the specific condition?

15 MR. MANGO: Well, your Honor, I don't  
16 have -- I believe the government does not have a  
17 problem referencing that Counts 1 through 5  
18 particularize they violated the permit by emitting  
19 coke oven gas from a pressure-release valve in the  
20 by-products department, an unpermitted emission  
21 source.

22 That parentheses, condition 4, I don't think we  
23 need to reference that, because that's -- we get  
24 into this tricky area where under the Clean Air Act  
25 it's a general-intent statute, and we've got to be

1 careful that we don't add a specific-intent element  
2 to it by --

3 THE COURT: But 4 -- I understand that.

4 I'm sorry to cut you off. But 4 is what applies  
5 there. In 6 through 10 it's 96. So doesn't that  
6 give direction without really running the risk that  
7 you change the elements with respect to intent or  
8 knowledge or whatever the case may be? There's --  
9 there's no risk of that, really, is there?

10 MR. MANGO: Not -- not as proposed by the  
11 Court. I would just be cautious if these are all  
12 broken out separately. I think in this form,  
13 covering them all 15 in one and then adding a  
14 separate charge that counts -- you know, with  
15 particularization, Counts 1 through 5 address a  
16 violation of the Title V permit, and then just take  
17 the language right out of the indictment, "by  
18 emitting coke oven gas from a pressure-release  
19 valve in the by-products department, an unpermitted  
20 emission source." And then if you want to add the  
21 parenthetical, that's fine. And then another,  
22 Counts 6 through 10 relate to --

23 THE COURT: Yeah. Go ahead.

24 MR. MANGO: -- relate to violations of the  
25 Title V permit, and then just follow the language,

1       "by operating the western quench tower," down the  
2 line.

3           You could do that all in one instruction, so  
4 you don't need -- in the government's view, you  
5 don't need to go through each set of these when you  
6 can do all 15 in one and then provide, if you want,  
7 this specific instruction for each of the counts  
8 afterwards.

9           THE COURT: Put yourself in the jury's  
10 position, though. Don't you think it would be  
11 helpful -- because we did talk about grouping of  
12 counts throughout the course of the trial -- to  
13 have it set out elementally as per each group? I'm  
14 not talking about adding the exemption aspect right  
15 now, but just in terms of the clarification with  
16 respect to the condition and whether we're talking  
17 quench tower 1 or quench tower 2, or --

18           But if you were to look at it, I mean, as the  
19 jury, I mean, when you -- you know, I kind of came  
20 in liking all 15, but to be covered by this one  
21 general instruction, it does make it more  
22 manageable in one respect, I mean, in terms of  
23 presenting it. But from the jury's perspective I'm  
24 wondering if maybe it would be helpful to break it  
25 down with the specific conditions. It just would

1 help everybody focus a little bit.

2 MR. MANGO: Your Honor, if I could just  
3 have one moment.

4 THE COURT: Yeah.

5 MR. MANGO: This is where -- we're  
6 comfortable, your Honor, with whatever approach you  
7 want to take. The concern is this knowledge  
8 element. In the Second Circuit case law,  
9 specifically in Weintraub, 273 F.3d 139 at 1478,  
10 the Court talked about what knowledge is under the  
11 Clean Air Act. And says that knowledge of the  
12 facts and attendant circumstances that comprise a  
13 violation of the statute, not specific knowledge  
14 that one's conduct is illegal.

15 So this gets into -- if -- if the Court is  
16 saying that the defendant had to -- I'm just  
17 worried about element 3 and element 4 blending  
18 together, where the jury will read the knowing --  
19 the general intent knowing standard as knowing it  
20 was a specific violation of condition 96 or 97.

21 THE COURT: So we could just work with the  
22 third element and set it out in a way that would  
23 relate to the three separate groupings, and that  
24 would accomplish, I think, what you want, and I  
25 think that would minimize the concerns that

1       Mr. Mango has, so that element 3 would be  
2 individualized to the groupings.

3                   MR. LINSIN: Your Honor, that's precisely  
4 what we were hoping. Obviously, we still have this  
5 issue with the second group, but -- concerning the  
6 exemption, but that is what we think would be  
7 faithful to what is charged, without in any way  
8 suggesting that we intend to argue or suggest that  
9 these are specific-intent crimes. We know better  
10 than that, your Honor.

11                  MR. PERSONIUS: Judge, I would like to be  
12 heard briefly on the --

13                  THE COURT: Yeah.

14                  MR. PERSONIUS: -- please, to -- when  
15 you're ready.

16                  THE COURT: I'm going to confuse myself if  
17 I let you speak too early here, Mr. Personius.

18                  MR. PERSONIUS: I'm sorry.

19                  MR. LINSIN: Your Honor, may I just -- I  
20 understand that even if the Court does not accept  
21 our argument on this language concerning the  
22 exemption for the second group, I understand the  
23 only issue then would be the -- the change in the  
24 third element that we've been discussing. I just  
25 believe it would be very helpful, even if the Court

1       would take the time to reread the first, second,  
2       and fourth elements, to explain to the jury: Look,  
3       here's your charge for Counts 1 through 5. And so  
4       they've got a charge to go to as they consider  
5       the -- here's your charge for Counts 6 through 10.

6           I see -- you know, the -- the benefit of  
7       clarity, I believe, is far outweighed by the  
8       minimal repetition that would occur. And I -- I  
9       certainly see no prejudice to the government. So  
10      that is -- that would be our recommendation to the  
11     Court, and even if the language of the first,  
12     second, and fourth elements didn't otherwise  
13     change.

14           THE COURT: Yeah. I don't mind doing  
15      that, necessarily. I think I'm going to make the  
16      change, and we'll itemize it in terms of element 3.

17           (Discussion off the record.)

18           THE COURT: Okay. Yeah, I'm going make  
19      the changes. We just have to figure out how I can  
20      comfortably present it. And I want to -- you know,  
21      when I give them the document, I want to have  
22      something that they will not be confused by.  
23      Because I think, very honestly, it really works to  
24      both -- to the advantage of both sides to make this  
25      as -- as clear as possible in terms of what we're

1 dealing with elementally. Because, you know, you  
2 always run the risk that the jury could throw up  
3 its hands one way or another against either side  
4 because they simply don't understand it. And  
5 that's not fair, I don't think.

6 I think we really want to get -- after all the  
7 effort that went into this thing -- the jury to  
8 really knowledgeably address these elements. And I  
9 know, because I speak to the jury every single  
10 case. I can -- I don't think I have a recollection  
11 of one jury that I know of that has told me they  
12 haven't gone to the elements discussions in guiding  
13 their deliberations. So I really want to do that.

14 I want to work with Andrew a little bit until  
15 we get what we're talking about now committed to  
16 paper. I'll give it to you again. But, I mean, I  
17 will change it, and I will make it more specific.

18 MR. LINSIN: Well, your Honor, I just -- I  
19 think it would be of assistance, we think it is  
20 faithful to the points we referenced, but in our  
21 submission on pages 2, 3, and 4 we have proposed  
22 language for what we believe those third elements  
23 should be for each of those groups.

24 THE COURT: Yeah, I have that right here.  
25 Okay. So I'm looking at it as we speak. But I

1 still need to determine how I'm going to do this in  
2 terms of setting up the instruction for a  
3 "threepeat," if you will. Okay. So -- but I'll  
4 work on that, and I'll give it to you one more  
5 time.

6 MR. LINSIN: All right.

7 THE COURT: Okay. Mr. Personius.

8 MR. PERSONIUS: Thank you, Judge. Judge,  
9 this goes back to the -- the issue that relates  
10 to -- I think I've got this right -- Counts 6  
11 through 10, which is the first quench tower and the  
12 exemption.

13 THE COURT: Yes.

14 MR. PERSONIUS: If something isn't put in  
15 about the exemption and the jury reads the third  
16 element, the risk is that they will say: Okay,  
17 we've got quench tower number 1. They'll go to --  
18 I think it's condition 96. Condition 96 says you  
19 have to have baffles. They'll say: If we follow  
20 the elements, there were no baffles in that quench  
21 tower.

22 If some mention isn't made that there's an  
23 exemption that the government has acknowledged from  
24 its opening statement that applies here, and the  
25 jury literally reads the elements, as Mr. Linsin

1 has indicated, he can talk until the cows come home  
2 about the exemption, but if the jury is faithful to  
3 the charge, they won't consider the exemption.

4 THE COURT: You know, I'm not sure -- I'm  
5 not sure I agree with that, necessarily. I want to  
6 work it out.

7 But, Mr. Mango.

8 MR. MANGO: Thank you, your Honor. The  
9 government definitely does not agree with that.  
10 There's been more than adequate discussion on the  
11 record with evidence, with testimony, of what  
12 condition 96 means based on the regulatory history.  
13 The jury's got enough to weigh the exemption issue  
14 in place here. And technically it's -- you know,  
15 the indictment is what the indictment is. And  
16 condition --

17 THE COURT: Well, yeah, but the operation  
18 in violation of the Title V condition and permit  
19 requirements, it's not in violation if there's an  
20 exemption that applies, is what you're saying,  
21 right?

22 MR. MANGO: According to the DEC  
23 witnesses. According to the EPA witness who took  
24 the stand, Mr. Eng, the defendants' witness, it's  
25 the Title V document that controls. But there has

1       been enough of this discussion. There's evidence  
2       in regarding this exemption. Your Honor, I believe  
3       we're all going to reference it, probably, in our  
4       closing argument.

5            MR. LINSIN: But the point is, your  
6       Honor -- and I apologize for interrupting, but the  
7       point is, if these instructions stand, however  
8       eloquent I am or Mr. Personius is about this  
9       exemption, Mr. Mango can state up in rebuttal close  
10      and say: Look at the instructions the judge is  
11      going to give you about the elements for these  
12      offenses. There is a not a single word about  
13      exemption in there. There's no requirement that  
14      the government prove anything about exemption.  
15      Follow the Court's instructions. Ignore this issue  
16      of exemption, and -- and --

17           THE COURT: Well, he can't argue that. He  
18      cannot argue that.

19           MR. LINSIN: On this count, with this  
20      instruction as it stands, as Mr. Personius just  
21      said, that's precisely what he can argue, that the  
22      government has no burden under this -- under this  
23      proposed charge. No burden to prove anything with  
24      regard to the exemption, because it's not  
25      referenced.

THE COURT: But you're saying that the burden switches to you with respect to establishing the applicability of the exemption.

4 MR. LINSIN: Your Honor, what we -- what  
5 we are saying is that -- and the element we have  
6 proposed is the government establish there was no  
7 valid exemption. This is the government's burden.  
8 The government's own witnesses have testified that  
9 they believe this exemption was in effect until  
10 November of 2009. Mr. Foersch testified about  
11 that. The DEC, the agency that regulated this  
12 facility for 25 years, has said with its own notice  
13 of violation we're only going to order baffles in  
14 quench tower number 2, not quench tower number 1.  
15 They knew there was an exemption in effect.

16           These are the government's witnesses and the  
17 agency that regulated the facility. And so the  
18 government's burden, I believe, and the one they  
19 have assumed in the way they've tried their case,  
20 is to prove that there is no valid exemption. And  
21 without a reference to that issue in these  
22 instructions, the jury will have no way to place or  
23 assess or evaluate what all this testimony has been  
24 about.

25 THE COURT: Well, let me hear from you on

1       that, Mr. Mango, because my concern is -- is that  
2       by not including it -- and, you know. I still  
3       think that it can be argued and that it's not  
4       blowing smoke, as you first referenced it,  
5       Mr. Linsin, or who was it, the cows come home? Is  
6       that what you said, Mr. Personius? I have both of  
7       your characterizations. But, I mean, I think the  
8       jury -- the jury has heard a lot about exemptions,  
9       and they can come to grips with it. I haven't  
10      settled this yet. But what -- my fear is this,  
11      and, you know, maybe I've got it slotted wrong,  
12      because Mr. Linsin didn't pick up on it. But what  
13      I'm afraid of is that there's some shifting of the  
14      burden to the defendants, and you don't want that  
15      to happen, because that to me is reversible error.

16           So, against that backdrop, I mean, by not  
17      proving that no exemption applies, doesn't that  
18      shift the burden to some extent to the defense to  
19      have to establish that an exception -- an exemption  
20      is applicable? All right. And that's problematic,  
21      perhaps. I don't know. You tell me.

22           MR. MANGO: Yes, your Honor. First, just  
23      so the Court is aware and the parties are aware,  
24      Mr. Piaggione is going to be doing the rebuttal.  
25      Mr. Linsin mentioned Mr. Mango could get up on.

1 I'm going to be doing the closing. Mr. Piaggione  
2 is going to be rebuttal.

3 THE COURT: Well, it's one and the same as  
4 far as we're concerned.

5 MR. MANGO: It is true. Your Honor, I  
6 don't think there is any type of shifting of the  
7 burden in this case, because the government, one,  
8 for the record, is not going to stand up and say  
9 that we don't have to -- we don't have to prove  
10 anything about an exemption, look at Title V. That  
11 would be contrary to what we said on the record,  
12 how the proof came in in evidence. Now, that  
13 testimony, I believe, is what is controlling, that  
14 according to the DEC's view, condition 96 had this  
15 exemption. So, of course, we've got to show that  
16 they violated the exemption.

17 THE COURT: Well, what does 96 require?

18 MR. MANGO: That -- 96 requires that all  
19 wet quench towers be operated with a baffle system  
20 to effectively reduce particulate emissions.

21 THE COURT: Does it reference exemption?

22 MR. MANGO: Condition 96 does not  
23 reference the exemption.

24 MR. PERSONIUS: Why would you have a  
25 four-week trial and risk this, and risk that --

1       that -- that there's a conviction on this set of  
2       counts and then you go up on an appeal and the  
3       Second Circuit says you should have included that,  
4       because of the point you're making, Judge, about  
5       it's burden shifting. And that's a good point.  
6       But I think if you literally read the charge as  
7       it's written out, it's going to create jury  
8       confusion.

9                   THE COURT: Well, I mean, you know, almost  
10       all the time you ask for extra elements to be  
11       inserted, Mr. Personius, because that puts a  
12       greater burden on the government than what the law  
13       generally requires. And that's problematic, and I  
14       don't want to do that. I don't want to give them a  
15       burden beyond what the law requires. But, you  
16       know, I also have that counterconcern about  
17       shifting the burden, to some extent. And I don't  
18       know if -- if -- you know, the jury has heard so  
19       much about exemptions. There's no reference to  
20       exemptions in condition 96. I don't see why it  
21       can't be forcefully argued without the jury -- and  
22       I won't allow the government to say: Look, you  
23       know, you don't have to consider the element of  
24       exemption.

25                   That doesn't make -- and that's your fear here,

1       Mr. Linsin.

2                   MR. LINSIN: But, your Honor, let's set  
3 aside for a moment that Mr. Piaggione -- no one on  
4 the government's team argues that they don't have  
5 to prove anything with regard to exemption. Let's  
6 say the jury then walks out into the jury room with  
7 this charge, with the charge itself that says  
8 nothing about exemptions. Nothing. It is silent.  
9 And the jury's going to be sitting there, "What the  
10 heck was all that testimony about? How do we  
11 apply -- how does that evidence of an exemption and  
12 whether it's valid or not or what the percentage --  
13 how does that relate to these charges?"

14                  THE COURT: Well, they're going to say,  
15 "We just heard Mr. Linsin and Mr. Personius argue  
16 that they qualified for an exemption, therefore  
17 they didn't violate the Title V permit  
18 requirements."

19                  MR. LINSIN: But, your Honor, you have the  
20 final word. They are going to be told: These are  
21 the elements the government needs to prove and only  
22 these elements.

23                  And if the Court doesn't give some guidance on  
24 how that proof relates to these five counts, I  
25 think, first of all, the -- the government's burden

1       that they have assumed in the way they've tried  
2       this case will not be accurately reflected in the  
3       charge, and the jury will be free to navigate the  
4       assessment of the evidence on these five counts  
5       without any reference or consideration to  
6       exemption.

7           THE COURT: Well, let me ask you this. I  
8       mean, the defense is always in a position to  
9       defend. That sounds redundant; right? And in  
10      order to defend there has to be a theory of  
11      defense. The theory of defense in this case is --  
12      at least with respect to 6 through 10, is that  
13      there was no violation of the Title V permits  
14      because there was an exemption that applied here.

15           MR. LINSIN: But, your Honor --

16           THE COURT: That's like an affirmative  
17      defense in a civil case, isn't it?

18           MR. LINSIN: Your Honor, the truth of the  
19      matter is, if the jury in this case goes no further  
20      than the literal language of the Title V permit as  
21      Mr. Mango has just said, they will not need to make  
22      any question or issue or make any finding --  
23      factual finding about an exemption. The Title V  
24      permit says nothing about this exemption.

25           THE COURT: What about a separate charge

1       that qualifying as an exemption is a defense to  
2       charges 6 through 10?

3                    MR. LINSIN: Your Honor, because we don't  
4       believe that this is a situation where the  
5       defendants have the obligation to establish an  
6       affirmative defense. We believe that the  
7       government's own witnesses have testified they  
8       believed there was an exemption that was in effect.  
9       Their own evidence has shown that. And what we're  
10      saying is the way they have tried the case, the way  
11      the evidence has come in, makes it clear that if  
12      there was going to be a violation for these baffles  
13      in quench tower number 1, they have to prove beyond  
14      a reasonable doubt that there was no exemption that  
15      applied.

16                  THE COURT: All right. All right. I'm  
17      going -- I'll consider the argument. I don't think  
18      I'm persuaded, but I'll -- I'll give it some more  
19      thought, because, just as you did there, I don't  
20      see why you can't argue that to the jury without  
21      confusing the jury. You know, it's a pretty sharp  
22      jury.

23                  MR. LINSIN: Well, your Honor, as I said,  
24      we can make the argument, but if the jury is  
25      sitting in the jury room with the Court's charge in

1 front of it and it is silent on exemptions, those  
2 arguments will have no place in the jury's  
3 assessment of whether or not the government's met  
4 its burden. None. I think it is -- it is -- I  
5 believe the Court must give guidance to the jury on  
6 what it is to do with these evidence -- this  
7 evidence and how it relates to whether there was a  
8 violation of the law.

9 THE COURT: All right. You know, I'm -- I  
10 don't know if I want to include it as another  
11 element. That's what I need to work out. I don't  
12 disagree that some guidance may be warranted here.  
13 Okay. But I just don't know if it -- if it  
14 involves including it as a distinct element when  
15 technically the charge on these violations don't.  
16 So I don't know where the place is for it yet,  
17 but -- but I think some guidance is probably a good  
18 idea, and I just don't exactly know where.

19 MR. LINSIN: Well, I would only point out,  
20 your Honor, we do not believe -- we strenuously do  
21 not believe that the guidance should place that  
22 burden on our shoulders.

23 THE COURT: Well, what about something, if  
24 you believe that an exemption applies with respect  
25 to 6 through 10?

1                   MR. MANGO: And that the defendants  
2 qualified for that exemption.

3                   THE COURT: Then you should acquit.

4                   MR. MANGO: Even something -- I agree. I  
5 don't like appending it as an element. And in the  
6 language that's included here, this is -- this  
7 would be even more confusing, that fourth that  
8 there was no valid exemption for the baffles  
9 requirement in effect. That's -- that's not how  
10 the testimony has come out. But I agree that  
11 guidance would be -- would be acceptable with the  
12 government in this case if it were something that  
13 established and captured the testimony here at  
14 trial.

15                  THE COURT: If you find that the  
16 exemption -- was it the 1994 exemption?

17                  MR. MANGO: '84.

18                  THE COURT: -- to the west quench tower.  
19 Right?

20                  MR. LINSIN: '84.

21                  THE COURT: 1984. Okay. Exemption to the  
22 west quench tower. If you find that, that it  
23 applied, you should vote to acquit.

24                  MR. LINSIN: Well, that -- that is an  
25 articulation of an affirmative defense, your Honor,

1 and we believe it problematic. We believe it  
2 absolves the government of a burden they should  
3 have of proof beyond a reasonable doubt.

4 THE COURT: But does it? Because what  
5 that does is it doesn't place the burden on either  
6 side. It leaves it up to the jury to determine.

7 MR. LINSIN: By what standard, your Honor?  
8 By beyond a reasonable doubt? That's -- that's  
9 just the point if we do not include it as an  
10 element. And that is why we're here. That is the  
11 burden the government assumes by walking in this  
12 courtroom with a criminal charge, and they should  
13 not -- with these five counts -- we have attempted,  
14 your Honor, to be fair and narrow in our proposals  
15 here, but we are -- we don't find a formula that  
16 properly captures this issue of the exemption for 6  
17 through 10 without requiring it as an element of  
18 the charges for those five counts.

19 THE COURT: Yeah, I mean, it does -- it  
20 does cause -- there is cause for concern, I think,  
21 in terms of by what standard does the jury make the  
22 finding if it's not included as an essential  
23 element of the government. I mean, from the  
24 standpoint of does it have to be addressed in a  
25 special verdict form, maybe it would have to be, if

1       we're dealing with setting it out in the language  
2       of "if you find," because they could find, I  
3       suppose, less than by a burden of beyond a  
4       reasonable doubt. But then, again, it's not an  
5       essential element, at least the way it's structured  
6       here.

7           So I still don't know if that requires the  
8       government to prove that no exemption applies. Let  
9       me try to work something up. I'll go back to the  
10      boards, and we'll talk about some guidance on that  
11      exemption. I think that's -- I think we should do  
12      something. I just don't know how we're going do it  
13      yet. So let me work on it. Okay? We're making  
14      some progress in that regard. I think by your own  
15      admission, Mr. Mango, something has to be done. I  
16      just --

17           MR. PERSONIUS: Judge, could I -- I make  
18      one suggestion, please?

19           THE COURT: Yeah.

20           MR. PERSONIUS: It doesn't add an element.  
21      If the third element for those five counts, 6  
22      through 10, were to read: Third, that during the  
23      time periods alleged in the indictment the  
24      defendant operated or caused to be operated an  
25      emission source -- or whatever language gets used

1 there -- comma -- not subject to --

2 MR. LINSIN: Quench tower.

3 MR. PERSONIUS: Quench tower. But comma,  
4 not subject to exemption, comma, in violation of a  
5 Title V operating permit.

6 It doesn't add an element, but it makes it  
7 clear that the exemption has to be considered.

8 THE COURT: That might do it.

9 MR. MANGO: That might.

10 THE COURT: All right. I don't want to  
11 give you a lot of credit for that, Mr. Personius,  
12 but I -- I think that might be helpful.

13 MR. PERSONIUS: I've got to wiggle out of  
14 the "cows come home" point I made.

15 THE COURT: I know. Yeah, let me think  
16 about that. That might work it. That might work.  
17 All right.

18 MR. MANGO: Yeah.

19 THE COURT: Okay. All right. Andrew,  
20 we'll note it.

21 LAW CLERK: I got it.

22 THE COURT: Okay. Yeah, I'm comfortable  
23 with that. Okay.

24 That was 41; right?

25 MR. MANGO: Yes, your Honor.

1 MR. LINSIN: Yes, your Honor.

2 THE COURT: Okay. I mean, that  
3 encompassed a lot, so, okay. We've got a little  
4 bit of work to do on that, but I think that was  
5 very helpful. Thank you.

6 Charge number 2, owner/operator.

7 MR. LINSIN: 42, your Honor?

8 THE COURT: Yes, 42. Hearing none,  
9 acceptable.

10 43, stationary source and major source.

11 Hearing nothing, acceptable.

12 44, Title V operating permit program. Hearing  
13 nothing, accepted.

14 46, Element 4, definition of "knowingly."

15 MR. LINSIN: I'm sorry. You missed 45.

16 THE COURT: Okay. New York State  
17 regulation. Thank you.

18 MR. MANGO: Your Honor, I would suggest at  
19 this point -- since this has now and is a factual  
20 issue that seems to be in dispute, I would suggest  
21 the adding after -- as part of this instruction,  
22 adding four definitions that come right out of the  
23 New York Codes, Rules and Regulations, which are  
24 emission source, construction, modification, and  
25 process. Because process is actually used in the

1 definition of modification.

2 I think that would -- that would help the jury  
3 in tackling the factual issue with whether the  
4 bleeder pressure-release valve is an emission  
5 source.

6 THE COURT: Mr. Linsin?

7 MR. LINSIN: Which definitions? I'm  
8 sorry. I didn't have my pen in my hand.

9 MR. MANGO: Yeah, I can give actual  
10 citations too.

11 THE COURT: Just tell us the --

12 MR. LINSIN: Source point --

13 MR. MANGO: Yes.

14 MR. LINSIN: -- modification and process?

15 MR. MANGO: Yes. Emission source. But  
16 under the regulations, emission source is actually  
17 defined as air contamination source or emission  
18 source. So if you look up just emission source  
19 you're not going to find it. You're going to start  
20 with air contamination source or emission source.  
21 We could probably leave out the air contamination  
22 source part. But that comes out of Part 200.

23 And in Part 201 there is the additional  
24 language regarding construction.

25 MR. LINSIN: Can I just ask what -- what

1 version of these definitions you're referencing?

2 What -- what year?

3 MR. MANGO: My understanding is that the  
4 current version, these -- these principles, these  
5 four terms, have not been changed since 2005.

6 MR. LINSIN: But we're talking about a  
7 permit that was issued in 2002. I think my view is  
8 that we would either have to go with the versions  
9 that -- as they existed in 2002 or separate  
10 versions for the different years in the five years  
11 of the indictment. If the -- if you're going to  
12 include a definition, it has to be the definition  
13 that is applicable to the time period in question.

14 MR. MANGO: In the indictment, which is  
15 2005 to 2009, that would be the government's  
16 position. And these definitions are consistent  
17 during that time period.

18 THE COURT: All right. Well, list the  
19 four. Then you have to get definitions, make  
20 certain that they apply, and the same ones apply  
21 between 2002 and 2005. If they're different, we'll  
22 use the two different ones.

23 MR. MANGO: Your Honor --

24 THE COURT: If it doesn't become  
25 overwhelmingly confusing.

1                   MR. MANGO: Right. I think, again, the  
2 time period would be 2005 to 2009. That's what's  
3 charged in the indictment, the time period. I know  
4 there was a reference that the Title V permit was  
5 issued in 2002, but it's -- that's a living  
6 document, and if there was a change, say in 2003  
7 or 2004, in 2005 when the indictment is charged the  
8 definition in effect should apply to what's charged  
9 that year. But the terms are emission source,  
10 construction, modification, and process. And I  
11 could --

12                  MR. LINSIN: Oh. Well, then, your Honor,  
13 emission point also must be included. There was a  
14 significant amount of testimony and questions of  
15 the witnesses regarding an emission point, and the  
16 distinction between source and point was a subject  
17 of quite a bit of examination of the government's  
18 witnesses.

19                  I thought you had included point initially.  
20 But point, we believe, would definitely need to be  
21 added. Your Honor, let me think and take a look at  
22 the applicability issue. Counsel may have a point  
23 that we need not go back to 2002 if -- if --

24                  THE COURT: If the permit process is a  
25 living process.

1                   MR. LINSIN: Exactly. Right. But one  
2 point I would make, your Honor, also, on this  
3 instruction is I think it would be helpful to  
4 include an introductory sentence or two indicating  
5 that this is -- this instruction is related to and  
6 particularized as to Counts 1 through 5 of the  
7 indictment. This doesn't really relate  
8 meaningfully to 6 through 15.

9                   MR. MANGO: That's fair.

10                  THE COURT: Fair enough.

11                  MR. LINSIN: And Counts 1 through 5 and  
12 condition 4 of the permit.

13                  THE COURT: Okay.

14                  MR. LINSIN: All right.

15                  THE COURT: Yes. Okay. But the  
16 definitions -- I mean, assuming you get a chance to  
17 look at those -- were we to include them, would  
18 also include emission point?

19                  MR. LINSIN: Yes, I believe that would be  
20 fair.

21                  MR. MANGO: I'll include the language  
22 in -- I presume I'll email this to chambers and  
23 counsel. Condition 4 says nothing about emission  
24 point. That's -- that could be argued. There was  
25 testimony what an emission point means.

1                   THE COURT: There's so much that involved  
2 that. I'll include the point. Send that out.

3                   MR. MANGO: All right.

4                   MR. LINSIN: Okay. Thank you, your Honor.

5                   THE COURT: So that would be five  
6 definition statements.

7                   MR. MANGO: Yes.

8                   THE COURT: Okay. All right. Where are  
9 we by your count?

10                  MR. LINSIN: 46, your Honor.

11                  THE COURT: Knowingly?

12                  MR. LINSIN: Yes.

13                  THE COURT: Anything on that?

14                  MR. LINSIN: Your Honor, I --  
15 substantively, no. But just on page 75 of the  
16 draft instruction, the first partial paragraph  
17 there, I was not sure why that final sentence was  
18 here in this discussion of knowingly.

19                  THE COURT: You mean, "Then you must find  
20 this emission was unpermitted and was in violation  
21 of the Title V permit"?

22                  MR. LINSIN: Right. I just -- I wasn't  
23 sure if that was an artifact of or -- but -- well,  
24 no. Actually, I withdraw my comment, actually.  
25 Now when I look at the paragraph as a whole, I

1 think it is appropriate. It is a clarification.  
2 And my only other point, your Honor, would be that  
3 if we -- depending on how the Court resolves the  
4 issue of -- well, no. I actually don't think it  
5 would require modification of the discussion for 6  
6 through 10 here. I think this -- this should --  
7 can stay as is, even if the other modification we  
8 were discussing is made, because this goes to that  
9 intent element, the knowingly standard. All right.

10 THE COURT: Okay. Okay. Charge 47,  
11 estoppel defense.

12 MR. PERSONIUS: Judge, we did include in  
13 our submission a request that there be a brief  
14 addition to that charge that is consistent, we  
15 think, with Second Circuit precedence as  
16 articulated in the two cases, Abcasis and George,  
17 that we cite in our submission at page -- page 4.  
18 And we've included on page 5 the paragraph, which I  
19 think is maybe just two sentences, that we think  
20 needs to be added to make it clear. What we're  
21 particularly concerned about, Judge, is that it be  
22 made clear to the jury that even if the jury were  
23 to conclude that the elements of any given offense  
24 had been proven beyond a reasonable doubt, this  
25 defense of entrapment by estoppel is still

1 available to the defendants. And that's what the  
2 Second Circuit has specifically articulated in  
3 Abcasis and in George. And the charge as written  
4 does not -- does not state that -- that clear to  
5 the jury.

6 So the concern is, as written, the jury could  
7 look at this charge, and one of the jurors might  
8 say, "Well, we're satisfied that each element of a  
9 particular count has been proven beyond a  
10 reasonable doubt, and therefore we convict," and  
11 that wouldn't be correct.

12 THE COURT: All right. I understand what  
13 you're saying, but where does your proposed  
14 language come from? Is that something that you  
15 crafted?

16 MR. PERSONIUS: Well, it's taking -- it's  
17 taking literally the language from George, I think,  
18 Judge, with maybe one change. If you compare the  
19 proposal we have with the George quote, which is on  
20 the bottom of page 4, and the proposal's on the top  
21 of page 5, they're almost identical. I can't tell  
22 you immediately what the change is, Judge, but it  
23 was simply a change made to make the charge  
24 consistent with -- with our case.

25 THE COURT: All right.

1                   MR. PERSONIUS: If you look at George, it  
2 really comes right from that, with, I think, maybe  
3 one word being changed.

4                   THE COURT: Let me -- I mean, I think  
5 that's right. So I'll just take a look at it and  
6 make sure.

7                   MR. PERSONIUS: I'm sorry I can't tell you  
8 right now what the change is.

9                   MR. MANGO: I see the change, your Honor.  
10                  It's the last -- in George, on -- in the block  
11                  quote on defense's submission, page 4, it says "in  
12                  reasonable reliance on a government," then says  
13                  "official's statement."

14                  MR. PERSONIUS: Right.

15                  MR. MANGO: In the block quote it says,  
16                  "committed in reasonable reliance on the conduct of  
17                  the government would violate due process or  
18                  fundamental fairness." It does change coverage,  
19                  and --

20                  MR. PERSONIUS: But you recognize  
21                  otherwise on your charge, Judge, that the reliance  
22                  can be based not only on the statement but also  
23                  conduct. So I mean, it could say a government  
24                  official's statement or conduct, and then it would  
25                  be consistent with the rest of the charge.

1           That probably would be the best way to do it, I  
2 think, and I should have done it that way.

3           THE COURT: I think -- I think that would  
4 be all right. The government's -- reliance on the  
5 government's statement.

6           MR. PERSONIUS: The government official's.

7           THE COURT: Official's statement or  
8 conduct.

9           MR. PERSONIUS: Right. I should have done  
10 it that way. I think Aaron's right.

11          MR. MANGO: Your Honor, putting that  
12 aside, we do have a question as to what counts  
13 entrapment by estoppel is that now the judge of the  
14 law finds this applies to. Because we haven't  
15 addressed that. In this charge it doesn't say you  
16 should only factor this into, say, the RCRA counts  
17 or, you know, the one -- one of the quench tower  
18 counts or -- and I think we need to do that,  
19 because we -- the government has a strong view that  
20 this does not apply, entrapment by estoppel. If it  
21 applies at all, it applies to Count 18 of the  
22 indictment, which is -- we heard testimony that  
23 there was potentially knowledge by the EPA that  
24 they were going to remove the material from inside  
25 the tank and place it on the coalfield.

1           The defense, in the government's view, hasn't  
2 met its burden with respect to anything else. And  
3 I think maybe we should need to, you know, work  
4 that out here.

5           MR. LINSIN: Your Honor, as I read draft  
6 charge number 47, the Court has stated at the end  
7 of the very first paragraph that this -- this  
8 defense relates to counts 1 through 15. And then  
9 later in the draft charge the Court clarifies that  
10 it also relates to counts 17, 18, and 19. The one  
11 count excepted, and we're not disputing this, would  
12 be Count 16, the obstruction count.

13           MR. MANGO: And it's the government's  
14 view, your Honor, that the entrapment by estoppel  
15 defense -- I mean, we have got now a witness who  
16 testified, Gary Foersch, who said he didn't give  
17 them authorization to operate the east quench tower  
18 number 2 without baffles. In fact -- in fact, he  
19 said, "You got to fix this." So, entrapment by  
20 estoppel, they haven't met their burden on that.

21           Quench tower number 1, that's the exemption  
22 issue. That doesn't apply to entrapment.

23           THE COURT: That's what you argue, right?  
24 I mean --

25           MR. PERSONIUS: Judge, what the case law

1       says -- we talked about this in the pretrial  
2 motion. What the case law says is there has to be  
3 a basis in the evidence for the defense to be given  
4 to the jury. Questions regarding credibility are  
5 something that the jury should assess.

6                     THE COURT: Yeah.

7                     MR. LINSIN: That's where I think we are.

8                     THE COURT: Okay. Yeah, I'll leave it  
9 stand. I don't think it needs to be further  
10 identified in terms of its applicability. It's  
11 really a matter for argument based on the testimony  
12 that the jury has heard.

13                  Okay. Preponderance of the evidence. Okay.  
14 Hearing nothing, that's accepted. That's number  
15 48.

16                  49, obstruction of justice. Hearing nothing,  
17 accepted.

18                  50, purpose of the statute. Hearing nothing,  
19 accepted.

20                  51, elements of the offense. Hearing nothing,  
21 accepted.

22                  I think we go down to 58 before we have any  
23 other discussions.

24                  MR. PERSONIUS: Yes, Judge. If you want  
25 me to put it on the record, this primarily relates

1 to Mr. Kamholz, and we think the charge the Court  
2 has proposed is appropriate.

3 THE COURT: Okay. Right up to 58 and then  
4 elements of the offense we're okay?

5 MR. PERSONIUS: I've got it in my version  
6 that goes to 54, and then I think 55 goes to the  
7 RCRA.

8 THE COURT: Yeah, but -- I'm just talking  
9 about no objections through 58.

10 MR. LINSIN: Your Honor, I have one  
11 comment on charge -- proposed charge number 55. It  
12 is minor, but in the introductory language to each  
13 count, I would request -- in looking at Count 17 as  
14 the first example, on the third line, I believe it  
15 should read, "deteriorating tanks at the Tonawanda  
16 Coke Corporation without a required permit," comma,  
17 so the words "without a required permit" we would  
18 ask be added in that location, and then a parallel  
19 amendment to each of the introductory paragraphs  
20 on -- with respect to Counts 18 and 19.

21 MR. MANGO: Your Honor, that's what -- the  
22 indictment does include "without a permit." It's  
23 the introductory language. I think he's trying to,  
24 you know, focus the jury and capture it. If it  
25 gets expanded too much, you lose the point of an

1 introductory paragraph. But we defer to the Court.

2 THE COURT: All right.

3 LAW CLERK: Can you say it one more time?

4 THE COURT: I'm sorry.

5 LAW CLERK: Could you say it one more  
6 time?

7 MR. LINSIN: Sure. What I'm requesting --  
8 I'll say it with respect to Count 17. The third  
9 line on page 87.

10 THE COURT: Beginning with "deteriorating  
11 tanks."

12 MR. LINSIN: "Deteriorating tanks at the  
13 Tonawanda Coke Corporation without a required  
14 permit," comma. So the words "without a required  
15 permit" would be added before the comma and after  
16 the word "Corporation."

17 THE COURT: So "without a required  
18 permit," period.

19 LAW CLERK: Right.

20 MR. LINSIN: Well --

21 THE COURT: And then Count 17 reads --

22 MR. LINSIN: I'm sorry. It was a period.  
23 Yes. I'm sorry. I thought it was a comma. Then  
24 period. Yes.

25 THE COURT: Okay. Okay. All right. So

1       through 57, with that comment addressing 55, there  
2       are no objections.

3                    MR. LINSIN: No objections.

4                    THE COURT: All those will be accepted.

5       We get to charge number 58, elements of the  
6       offense.

7                    MR. LINSIN: Right. Your Honor, we  
8       believe that it is an accurate statement of the law  
9       with respect to Count 17 -- well, as a general  
10      matter, I'll state it, that with respect to the  
11      RCRA counts, we believe that the Count 17  
12      instruction should be a standalone instruction, and  
13      then 18 and 19, both of which are disposal counts,  
14      could, I believe, be addressed in tandem.

15     But we believe that, given that the material --  
16     and there's a stipulation to this effect -- that  
17     the material that is the subject of Count 17 had  
18     been abandoned by a prior owner, and given what we  
19     believe to be the uncontradicted evidence in the  
20     case that without active management that material  
21     was not subject to RCRA regulation, we believe the  
22     government should be required, as the first element  
23     here, to establish that the defendants actively  
24     managed a waste that is subject to Count 17  
25     after -- and we have proposed, your Honor, the date

1       of December 25th, 1990, which was actually the date  
2       D018 wastes were defined as characteristic  
3       hazardous wastes under the RCRA regulation.

4           It does not do violence in any way to the  
5       government's proof. Their proof and theory of the  
6       case is that active management occurred consequent  
7       to that date. But we believe that's faithful to  
8       the regulations. But we -- we believe, your Honor,  
9       that without requiring that this be an element, the  
10      jury again will have no way to assess the  
11      significance or importance of whether this material  
12      was actively managed or not.

13           And we also believe, your Honor, that there  
14      needs to be a unanimity guidance with respect to  
15      this element so that the jurors are told that --  
16      and the special verdict form would then reflect  
17      that they are unanimous as to what action they find  
18      constitutes active management for this material.

19           THE COURT: Okay. Well, let's deal with  
20      the inclusion of the December 25th, 1990, date.

21           MR. MANGO: Your Honor, my concern is that  
22      the stipulation does not -- does not capture what  
23      Mr. Linsin is telling the Court. The stipulation  
24      says that some of the material that had been in the  
25      two tanks had spread on the ground in the vicinity

1 of the two tanks. It doesn't say all of the  
2 material on the ground were there prior to 1978.  
3 That's not what the stipulation says.

4 And there's testimony that some of the material  
5 flowed out of the tanks after 1990. So we get too  
6 far into -- if I can finish here, there's clear  
7 pictures which show that material had flowed out of  
8 the tanks. There's testimony that material had  
9 flowed out of the tanks. And I believe the way the  
10 testimony has come out is that material that has  
11 flowed out of the tanks subsequently after the  
12 enactment of RCRA, you don't need to actively  
13 manage. That is subject to RCRA regulation, and  
14 you would need a permit.

15 So by appending this active management element,  
16 it would -- it would cause a problem, in that it  
17 would confuse the jury as to, well, what material  
18 was there before 1990, what material may have come  
19 out after 1990. That's --

20 MR. LINSIN: Well, your Honor, if that is  
21 the government's theory, then this -- then the  
22 instruction needs to be differentiated as to which  
23 material is in issue and when the conduct occurred  
24 that brought it within RCRA regulation. The charge  
25 would need to be -- to provide clear guidance to

1 capture the points Mr. Mango has just made.

2 If they're not told somehow as to how this  
3 material was under RCRA regulation or became  
4 subject to RCRA regulation, the count is deficient,  
5 and the government would avoid establishing  
6 elements that are necessary to prove the charge.

7 THE COURT: Now, you're talking both with  
8 respect to the date from which prospectively  
9 there's a requirement for active management,  
10 meaning December of 1990?

11 MR. LINSIN: No. I didn't hear Mr. Mango  
12 to be debating the date for that. What I  
13 understood Mr. Mango to be saying is that with  
14 respect to the material that may have leaked out of  
15 this tank at some point. What I understand  
16 Mr. Mango to be saying is, I presume, based on the  
17 testimony of Mr. Flax, that because that material  
18 had previously been in a tank, it is Mr. Flax's  
19 view that that was stored in the tank and thus  
20 always subject to RCRA regulation from the date of  
21 enactment of RCRA. That's if I understood  
22 Mr. Mango's point. And then became subject to a  
23 RCRA storage permit requirement once it flowed out  
24 onto the ground.

25 But that is differentiated from the material

1       that is on the ground initially and over which some  
2       breeze had been spread. And that active management  
3       concept comes into play with respect to the  
4       spreading of that breeze.

5           So, you know, to capture fairly the complexity  
6       of the point that Mr. Mango is making here, the  
7       jury needs to be given some guidance about how it  
8       should assess the material that was once in the  
9       tank and may have flowed out, and what law applies  
10      to it, and then how the concept of active  
11     management must be fit into the jury's assessment  
12     of the regulatory status of material on the ground.

13           THE COURT: That's what Flax said, that  
14       stored material was always subject to RCRA.

15           MR. LINSIN: That was his testimony, your  
16       Honor. Miss Williams testified, as the Court may  
17       recall, in a very different way.

18           But my point here is, clearly stating what the  
19       law is -- and, you know, there is dispute on this  
20       issue, and providing guidance to the -- to the jury  
21       is what this charge is intended to do, and I  
22       thought the fairest way, being faithful to the  
23       general theory that the government had, was to make  
24       it clear that the government had to establish there  
25       was active management of the material on the

1 ground.

2 If the government is now saying they want to  
3 also go with a theory that this material in the  
4 tank was subject to RCRA, that raises a new set of  
5 issues, but it doesn't negate the point I'm making  
6 regarding how active management needs to be  
7 considered with respect to the materials on the  
8 ground.

9 THE COURT: This is Count 17?

10 MR. LINSIN: Yes, your Honor. Just as to  
11 Count 17, the count which relates to storage of the  
12 material on the ground without a permit.

13 MR. MANGO: Your Honor, if I could have  
14 one moment, I want to consult with Miss Dubriel,  
15 the EPA attorney.

16 THE COURT: Yeah.

17 MR. LINSIN: Could we perhaps take a --

18 THE COURT: Want to take a 15-minute  
19 break? I'll tell you, you know, this is okay, and  
20 I know you're going to -- you know, we're planned  
21 to start at 12:00 o'clock or so. We'll watch that  
22 a little bit. But, you know, we've got a little  
23 time to work out the charge. I mean, we're not  
24 going to have it by the time you finish your  
25 argument. We're going to be working it through. I

1 mean, you basically know where we're coming from so  
2 far, so we just have to -- you won't have it on  
3 paper before you argue.

4 MR. LINSIN: As long as we have it clearly  
5 articulated, your Honor, especially as to the --  
6 the -- well, the points we focused on in our  
7 discussion, that would be helpful.

8 THE COURT: Yeah. And I think -- at least  
9 I'm clear in terms of where we decided we should go  
10 with everything up to this point in time. So this  
11 is a fresh start area right here. Let's take at  
12 least 15, and then I want to give you some time  
13 before we get --

14 MR. PERSONIUS: I was going to say, Judge,  
15 I maybe mistakenly thought there would be at least  
16 an hour between when we would finish this and when  
17 we would close and --

18 THE COURT: We don't have too much more  
19 after this, right?

20 MR. PERSONIUS: I just wanted to express  
21 that.

22 MR. LINSIN: I believe that's correct,  
23 your Honor.

24 MR. MANGO: I would agree if -- if I do  
25 have to go back to the office, which I'd like to do

1 to email the definitions for these five regulatory  
2 definitions, I would probably ask for something on  
3 the order of an hour once we conclude here and  
4 close, if that's possible.

5 THE COURT: Well, do you need that right  
6 now? I mean, to get those definitions? Are you  
7 going to reference those?

8 MR. LINSIN: I have them, your Honor.

9 THE COURT: Okay. All right. Okay, yeah.  
10 I mean, we can do that. We'll take an hour. Let's  
11 take 15 now.

12 MR. LINSIN: Thank you, Judge.

13 THE COURT: Thank you.

14 (Short recess was taken.)

15 THE COURT: Okay. And the attorneys are  
16 back convened in U.S.A. versus Tonawanda Coke and  
17 Mark Kamholz.

18 This last discussion that we started to have, I  
19 think, as it related to Count 17, it seemed like --  
20 I mean, frankly, I wasn't following it very well.  
21 But is that something that the two of you,  
22 Mr. Linsin and Mr. Mango, could work out, I mean,  
23 on this date, or do we have to get it resolved this  
24 way?

25 MR. LINSIN: We actually did have some

1 conversations after the break, your Honor. I'm not  
2 quite sure where Mr. Mango is on this. I believe  
3 it would be unnecessarily complicated to get into  
4 this storage issue and the tank material. The  
5 concept, I think, that Mr. Mango was referencing,  
6 this issue of the material leaking out of the tank,  
7 it could actually be considered within this  
8 definition of active management, because active  
9 management includes the addition of a hazardous  
10 waste to preexisting wastes.

11 So I don't know Mr. Mango's position on that.  
12 Our basic point, your Honor, hoping we don't  
13 complicate this issue with the concept of storage  
14 in the -- of the material in the tank, because,  
15 honestly, I don't know how the Court can resolve  
16 that as a legal issue, given this record and the  
17 fact that it is coming up at this late hour. And  
18 there is conflicting testimony about the legal  
19 status of this material inside the tank.

20 But our basic point is that, at least with  
21 respect to active management, we believe it is a  
22 factual issue, a factual issue that the jury must  
23 find in order to conclude that a violation  
24 occurred. The stipulation of the parties was that  
25 the material inside the tank and on the ground

1       outside the tank had been abandoned by a prior  
2       owner. And there is the pretrial submissions on  
3       this issue, and the testimony, I think, has been  
4       consistent that abandoned material does not become  
5       subject to RCRA regulation unless there has been  
6       active management. And holding the government to  
7       that proof as an element of this offense I think is  
8       imperative.

9                     THE COURT: I think that's right. I mean,  
10          that's the testimony, that unless active management  
11          is factored in, abandoned waste is not subject to  
12          RCRA.

13                    MR. MANGO: That's correct, your Honor. I  
14          think we -- we are in agreement on that. The --  
15          what the government, now that I've had a chance to  
16          counsel, is strongly opposed to any inclusion in a  
17          special verdict form in terms of what activity the  
18          jury needs to find unanimously constituted active  
19          management.

20                   The term is going to be defined by the Court,  
21          and the facts have been examined during -- during  
22          testimony, and they have that. They don't need a  
23          special verdict form on that issue.

24                   THE COURT: Yeah, let me hold you right  
25          there. I don't think you're asking for that, are

1 you?

2 MR. LINSIN: Well, your Honor, I'm not  
3 asking in the special verdict form that the jurors  
4 detail what activity they find to have been active  
5 management. That's not our request. But because  
6 there -- there have been -- there is testimony  
7 about a number of activities which potentially  
8 could constitute active management, we do believe  
9 it's -- it is required that the jury be instructed  
10 that they agree unanimously on which activity  
11 constituted active management.

12 Because, in the absence of that, your Honor,  
13 you could have six jurors concluding that the  
14 leakage from the tank is active management, six  
15 jurors concluding that spreading of coke breeze is  
16 active management. And that is not permissible.  
17 So it is not a request that the jurors specify,  
18 yes, we believe spreading of coke breeze, but just  
19 a special verdict form saying that we have found  
20 unanimously that -- that there was active  
21 management with respect to a given activity. That  
22 I think is important because of the range of  
23 testimony about the interaction with this material.

24 THE COURT: Mr. Mango?

25 MR. MANGO: Yes, your Honor. The -- the

1 issue with active management comes up -- obviously,  
2 you've heard the testimony. Material is on the  
3 ground prior to the enactment of RCRA; RCRA gets  
4 enacted; if they left it alone they're fine. But  
5 if they actively manage it, then -- then that --  
6 that's the requirement for regulation under RCRA.  
7 And that is captured in the count of the indict --  
8 or the element of the charge which talks about in  
9 Count 17 the fact that they did not have a permit  
10 to store this material on the ground. That -- that  
11 is -- that, in essence, captures this active  
12 management.

13 So I think we're maybe talking about two  
14 different things. I guess I'm not really focused  
15 on what specifically is being requested to be  
16 changed in the elements of the offense charge.

17 MR. LINSIN: Well, and -- I'm sorry,  
18 Mr. Mango -- on page 6 of our submission we have  
19 proposed that a first element be included with  
20 respect to the instruction for Count 17 to the  
21 effect that, first, the defendant actively managed  
22 a waste that is the subject of Count 17 after  
23 December 25th, 1990. We believe that should be the  
24 threshold, the first element, for this charge for  
25 Count 17.

1           And, as we go on to say, we believe there  
2        should be a corresponding finding in the special  
3        verdict form -- I think this is addressed in  
4        footnote 4 on page 6 -- that they be instructed  
5        they must unanimously agree as to what, if any,  
6        activity constituted the active management that is  
7        the subject of the count. And then a special  
8        finding in the verdict form that they -- they so  
9        found unanimously.

10           THE COURT: That there was active  
11        management but without specificity.

12           MR. LINSIN: Exactly. That they -- that  
13        they found unanimously as to what, if any, activity  
14        constituted active management. Not that they all  
15        separately agree that different things constituted  
16        active management. That finding, your Honor, we  
17        believe has to be unanimous under Apprendi.

18           MR. MANGO: Your Honor, my -- my concern  
19        right now is on this fifth element on page 6 of the  
20        defendants' submission, which says that RCRA permit  
21        was required --

22           MR. LINSIN: We haven't -- we haven't  
23        gotten to that point, your Honor. We do believe,  
24        and we've set this out on pages 6 and 7 of our  
25        submission -- we do believe that it is appropriate

1 to include the requirement that a RCRA permit was  
2 required to store this hazardous waste, and then  
3 that there was no RCRA permit issued to Tonawanda  
4 for that activity.

5 MR. MANGO: They're reading that  
6 backwards, though, your Honor. The statutory  
7 elements under the case law is that they stored  
8 without a permit. That's it. Period. We  
9 shouldn't try to reshuffle these elements -- or  
10 this language -- to fit that they had -- they had  
11 to get a permit to store this material.

12 THE COURT: We're saying the same thing,  
13 aren't we?

14 MR. MANGO: Yeah, it is, but the case  
15 law -- the Second Circuit case law is clear it's  
16 storage without a permit. That's what the  
17 government needs to prove.

18 THE COURT: All right. And I -- that's --  
19 I don't see why that doesn't work.

20 MR. LINSIN: Your Honor, we believe this  
21 is a clearer statement. I'm not going to belabor  
22 the point. We think -- I don't think the  
23 government disputes the concept here --

24 THE COURT: I don't think they do either.

25 MR. LINSIN: -- that a RCRA permit is

1 required and that no permit was obtained. And I  
2 see no harm at all, no additional burden, in just  
3 making that clear. But our larger point on this  
4 Count 17, your Honor, relates to this additional  
5 element concerning active management.

6 THE COURT: Yeah. And I don't think  
7 Mr. Mango has a problem with that, so I'm inclined  
8 to include that, that there is the active  
9 management waste requirement. But I'll leave the  
10 language with respect to the RCRA permit the way it  
11 is.

12 MR. MANGO: Yes, your Honor. You do have  
13 it in your fourth element there that the defendant  
14 did not have a permit to store or dispose for  
15 Count 18, but really stored. And that's what the  
16 case law says.

17 THE COURT: Okay. All right.

18 MR. MANGO: Thank you.

19 THE COURT: Andrew, we're okay with that?

20 LAW CLERK: Uh-huh.

21 THE COURT: Okay. Let's move on then.

22 MR. LINSIN: Your Honor, on -- given our  
23 last discussion, I -- I question now -- well, I  
24 guess the government would still want this. But  
25 with respect to draft charge 59, I would request

1       that in the last sentence the two words be added.  
2       The sentence currently reads, "Wastes that have  
3       already been disposed of cannot be considered to be  
4       in storage." I would just request that it state,  
5       "Wastes that have already been disposed of or  
6       abandoned cannot be considered to be in storage."

7                    MR. MANGO: No, your Honor. That would be  
8       attempting to add, in our mind, your Honor, a  
9       little bit -- a defense into that sentence,  
10      because, you know, this then touches back into the  
11      active management area that if it's -- even if it's  
12      abandoned, but they actively manage it, then it's  
13      considered storage. So the language, in the  
14      government's view, is fine as it is. And it  
15      does -- that -- the first part of that language  
16      comes right out of RCRA.

17                  MR. LINSIN: Your Honor, I don't believe  
18      the government disputes the -- the accuracy of the  
19      addition I'm proposing. It is simply a  
20      clarification for terms that have been used  
21      essentially interchangeably in this trial.  
22      Disposed of or abandoned cannot be considered to be  
23      in storage. If those materials are thereafter  
24      actively managed, then -- then they are subject to  
25      RCRA requirements. So it fits precisely with our

1 previous discussion on active management.

2 MR. MANGO: Your Honor, I disagree. I  
3 think this would change your definition of -- would  
4 modify the discussion previously about active  
5 management, and, in fact, obviously there has been  
6 some agreement that the material on the ground had  
7 been abandoned, but we're not -- we are saying very  
8 much so that because it was actively managed it was  
9 stored. So that would -- that would create  
10 confusion and inject a defense that: Well, wait a  
11 second, the government agrees it was abandoned.  
12 The judge is going to tell you wastes that have  
13 been disposed of or abandoned can't be considered  
14 to be in storage. So how can we be in violation  
15 of Count 17? Everybody agrees it was abandoned.

16 That's -- that's not what the testimony of  
17 Mr. Flax was. There may be a dispute on that, but  
18 if there's a dispute it shouldn't be included in  
19 the definition of storage.

20 MR. LINSIN: Perhaps a way to address  
21 counsel's concern would simply be to say, "Wastes  
22 that have already been disposed of or abandoned  
23 cannot be considered to be in storage unless they are  
24 first actively managed."

25 MR. MANGO: That's -- that's also -- that

1       would -- that would negate the testimony of  
2       Mr. Flax, who said the material in the tanks that  
3       we agree was abandoned, in his view, was considered  
4       storage. So, again, I don't think any change in  
5       this is necessary at this point. We're trying to  
6       keep this clean for the jury. This is clean.

7                    MR. LINSIN: Well, my concerns now are  
8       heightened, because it now appears that the  
9       government will be arguing an additional theory  
10      here that I thought we had escaped in our  
11      discussion in the last draft charge, and that is  
12      that the jury can convict based on the testimony of  
13      Mr. Flax that this material inside the tanks was in  
14      storage as of the date of the RCRA -- the enactment  
15      of the RCRA statute. The Court has made no finding  
16      about that as the controlling law in this case.  
17      There is conflicting opinion testimony about that  
18      issue, and I don't believe counsel should be  
19      permitted to argue that as a legal theory for  
20      liability on Count 17.

21                    MR. MANGO: We're not planning to, your  
22      Honor. We just don't want to add a confusion that  
23      we don't need here.

24                    THE COURT: Well, how is it confusing to  
25      say, "disposed of or abandoned unless it's actively

1 managed"?

2 MR. LINSIN: "Cannot be considered to be  
3 in storage unless it is first actively managed."  
4 It clearly synchs up with the discussion on active  
5 management.

6 MR. MANGO: That's not what Mr. Flax said.

7 THE COURT: Well, it doesn't matter what  
8 he says. Right?

9 MR. LINSIN: Exactly.

10 MR. MANGO: I know, but the Court would  
11 then be giving a statement to the jury that  
12 Mr. Flax was either wrong or his testimony was  
13 irrelevant or --

14 THE COURT: Well, you can still argue  
15 that, right?

16 MR. MANGO: Your Honor, the definition, as  
17 well -- I believe, the definition of solid waste  
18 does state that it can be discarded by being stored  
19 in lieu of incineration and disposal. And I'd like  
20 to check the language in RCRA that -- that storage  
21 comes from, because I think it -- I'm kind of at a  
22 loss here. I don't know why we're trying to modify  
23 something that really has no bearing on the issues  
24 in the case here.

25 MR. LINSIN: Your Honor, my proposal, I

1 think, is an effort to help clarify this concept  
2 and to help explain to the jury how they should  
3 consider this definition in conjunction with the  
4 concept of active management. I don't believe  
5 there is any -- I don't hear any real dispute about  
6 the accuracy of what we propose. And I don't see  
7 it as -- as confusing issues. I see it as helping  
8 to clarify this instruction for the jury.

9 MR. MANGO: But -- but it would be, your  
10 Honor. These are questions the jury had -- that  
11 the jury included in their questions, so this is  
12 something that's very much in their minds. So by  
13 including this language, "Wastes that have already  
14 been disposed of or abandoned," that's -- that's  
15 not what the RCRA definition of storage says. It  
16 simply says, "Wastes that have already been  
17 disposed of cannot be considered to be in storage."

18 And there has been differing testimony as to  
19 what the material -- and I guess the nature of the  
20 material inside the tanks. And I think if -- if  
21 this change is included, then the defense in that  
22 definition is -- is essentially allowing the Court  
23 to -- to strike down Mr. -- a portion of Mr. Flax's  
24 testimony.

25 THE COURT: Well, is that an addition to

1           the definition in RCRA of storage?

2           MR. LINSIN: Your Honor, I don't have my  
3 regulation book here. I don't -- I don't know off  
4 the top of my head, your Honor. I can't represent  
5 to the Court. I did not understand this to be a --  
6 the last sentence, anyhow, to be a quotation from  
7 the RCRA definition. If that is counsel's  
8 representation, then, yes, I would be proposing a  
9 clarifying addition to the definition, that -- that  
10 I think is helpful.

11           THE COURT: All right. If RCRA says what  
12 it says here, I'm going to go with that, and I'll  
13 deny the request to augment. Okay. Let's move on.

14           If it's -- if it doesn't say what this says it  
15 purports to say, then -- then I think that gives us  
16 wiggle room to clarify.

17           MR. LINSIN: And, your Honor, just to be  
18 clear, if this is a complete quote for the  
19 statutory, I guess, not regulatory definition of  
20 storage, then -- well, I'll withdraw my  
21 objection -- or my request.

22           THE COURT: Okay. Okay. All right.

23           Disposal, 60. Okay. Hearing nothing,  
24 accepted.

25           61, solid waste. Hearing nothing, accepted.

1           62 --

2           MR. MANGO: Your Honor, with 61, now that  
3       there has been discussion of solid waste and the  
4       government has put in our proposed summary chart,  
5       Government Exhibit 212, that -- there's certain  
6       language that was focused on in that chart that  
7       maybe we want to focus on solely in this  
8       instruction. I leave it at the Court's discretion  
9       on that. But there was really two key elements in  
10      solid waste that apply under the recycling  
11      provision, whether it is being used to produce a  
12      fuel, which is not included here, or used -- used  
13      or applied to the land in a manner constituting  
14      disposal.

15           I think -- I think that would make sense to  
16       maybe expand this a little bit now that we've got  
17       the testimony of both Miss Williams and Mr. Flax.

18           MR. LINSIN: Well, now -- now I'm  
19       confused. Is this -- is what is proposed in charge  
20       61, is that a -- is that a quotation from the  
21       statutory definition of solid waste?

22           THE COURT: That comes off of the chart,  
23       right? That language that you were referring to?

24           MR. MANGO: Well, that's what I would  
25       propose come into here. I think this is -- this is

1       a modification of that, but I would just, I guess,  
2       ask that -- that we be truer to what is on  
3       Government's Exhibit 212 and -- and which models  
4       the regulations, which is the exact language out of  
5       the regulations.

6                   THE COURT: Well --

7                   MR. LINSIN: My question went to whether  
8       we're now switching back and forth when it suits  
9       our purpose between a statutory definition and a  
10      regulatory definition.

11                  THE COURT: And that's where I was going  
12      to go with that question. Is this a regulatory or  
13      statutory definition? And then you're asking what  
14      you just said you didn't want to do in the prior  
15      discussions. So if this is what the regulatory or  
16      statutory definition is, we'll leave it alone.

17                  MR. MANGO: I think it's a little of both,  
18       your Honor. I think there's a statutory portion in  
19       here and a regulatory portion.

20                  THE COURT: Well, that's good enough, I  
21       think, then. We'll just leave it that way.

22                  MR. MANGO: Yes, your Honor.

23                  THE COURT: Thank you. 62 is K087.

24                  MR. LINSIN: And, your Honor, we had in  
25       this regard made a request that is contained in our

1       pages 7, 8.

2                   THE COURT: That's with respect to intent  
3       element?

4                   MR. LINSIN: That is correct, your Honor.

5       And we believe that was the basis -- the expressed  
6       basis of Magistrate Judge Schroeder's ruling in  
7       the -- with respect to the dispositive motions on  
8       these counts, expressly contained in his report,  
9       recommendation, and order, which was adopted by  
10      this Court. Magistrate Schroeder clarified that  
11      the government would need to prove an intent to  
12      dispose of this material, with respect to the  
13      disposal counts, and that would go to 18 and now  
14      19.

15                  We believe that the law-of-the-case doctrine  
16       and the holding of Magistrate Judge Schroeder's  
17       report, recommendation, and order, which has been  
18       adopted by this Court, now requires the government  
19       to prove that element with respect to the two  
20       disposal counts.

21                  THE COURT: Yeah, but we talked about that  
22       in the context of the decision he rendered and not  
23       for purposes of the proof element at trial, as I  
24       recall it. Because it had that limited  
25       applicability. It was with respect to the

1 decision.

2 Mr. Mango?

3 MR. MANGO: Yes, your Honor. I have that  
4 decision. We did discuss this. It's my  
5 recollection -- well, I have it here -- that at  
6 page 17 Judge Schroeder specifically said,  
7 "Notably, the defendants' argument turns on a  
8 determination of the defendants' intent." So he  
9 acknowledged that it was the defendants' argument  
10 that there's this intent element.

11 But in no way is he trying to bind your Honor  
12 in making, you know, a determination on what the  
13 elements of RCRA are.

14 MR. LINSIN: Your Honor --

15 THE COURT: It's been your consistent  
16 position that there is no intent element that needs  
17 to be proven by the government with respect to  
18 satisfying Count 19.

19 MR. MANGO: Correct, your Honor, other  
20 than just the general "knowingly" intent, not an  
21 intent to dispose, which is requested.

22 MR. LINSIN: Well, your Honor, I would  
23 point out that on the very next page of Magistrate  
24 Judge Schroeder's ruling he stated, "In addition to  
25 the issue of whether the defendant intended to

1 dispose of material" -- in addition to that issue.

2 "There also remains" --

3 THE COURT: He says "issue," right? He  
4 doesn't say "element."

5 MR. LINSIN: Yes. Yes. "There also  
6 remains the issue of whether the conduct of the  
7 defendant and its employees in mixing this material  
8 constituted land disposal."

9 These are issues in the trial, issues that  
10 Magistrate Judge Schroeder clearly said would be  
11 reserved for findings. "As discussed above, there  
12 are a myriad of factual issues, including the  
13 penultimate issue of the defendants' intent, which  
14 all must be resolved by the jury."

15 And the fact is, your Honor, by making those  
16 findings and ruling as he did on these motions with  
17 that recognition in mind that these were factual  
18 issues for the jury to resolve, without presenting  
19 that issue for the jury to resolve, we are negating  
20 what we see is the clear holding of this ruling by  
21 Magistrate Judge Schroeder.

22 THE COURT: I don't really agree with that  
23 position. Mr. Mango, do you take issue?

24 MR. MANGO: Yes, your Honor. We've  
25 expressed our position.

1                   THE COURT: Okay. And I don't view it as  
2 law of the case, so I will deny that request for  
3 the addition of the intent element.

4                   Okay. All right. Proposed charge 63,  
5 hazardous waste. Hearing nothing, accepted.

6                   64, knowledge. Hearing nothing, accepted.

7                   65, permit requirement. Hearing nothing,  
8 accepted.

9                   Entrapment by estoppel defense. Okay. We  
10 talked about that previously, but with respect to  
11 this placement, hearing nothing, accepted.

12                  67, aiding and abetting. Hearing nothing,  
13 accepted.

14                  Venue, various states, et cetera. Hearing  
15 nothing, accepted.

16                  So that will take us through 77.

17                  Okay. Thank you. Appreciate it. Very  
18 helpful, very constructive, I think.

19                  Chris, is the jury here?

20                  COURT SECURITY OFFICER: I know they are,  
21 but I haven't checked on them personally.

22                  THE COURT: Okay.

23                  MR. LINSIN: 45 minutes?

24                  THE COURT: 1:00 o'clock or 12:45?

25                  MR. LINSIN: I would ask 1:00 o'clock.

1                   THE COURT: All right. Chris, tell them  
2 that we will start at 1:00 o'clock with closing  
3 arguments.

4                   Does that work for everybody?

5                   MR. LINSIN: Just for guidance, your  
6 Honor, does the Court intend after the government's  
7 opening closing to take a break, or are we just to  
8 proceed forward from there?

9                   THE COURT: No, we'll take a break,  
10 because that's an hour anyway. All right. So  
11 we'll take a little break, and then we'll go with  
12 the defense argument and we'll break, and we'll do  
13 the rebuttal and we'll break. And the way it's  
14 shaping up right now, we're probably looking at  
15 completion of the charge tomorrow.

16                  MR. LINSIN: All right. Thank you very  
17 much, your Honor.

18                  MR. PERSONIUS: Thank you, Judge.

19                  THE COURT: All right. If anybody is here  
20 for the starting of the trial, that will not get  
21 started until 1:00 o'clock, just so you know.  
22 Okay. We're just a tad behind, but we need that  
23 time to get everything taken care of so we can have  
24 an effective oral argument.

25                  Okay. Mr. Moeller, is there anything?

1                   LAW CLERK: No, Judge.

2                   THE COURT: Okay. Thank you very much.

3                   (Lunch recess was taken.)

4                   (Jury not present in the courtroom.)

5                   THE CLERK: Criminal case number

6                   10-CR-219, United States versus Tonawanda Coke and

7                   Mark Kamholz.

8                   THE COURT: Okay. For the record the  
9                   attorneys and parties are back present. The jury  
10                  is assembled. We will bring them in shortly. I  
11                  just want to make sure that the rules are clear.  
12                  The government will commence the closing arguments,  
13                  followed by Mr. Linsin and Mr. Personius, and then  
14                  there will be the opportunity for a rebuttal  
15                  argument by Mr. Piaggione.

16                  Is that the understanding of counsel?

17                  MR. MANGO: Yes, your Honor.

18                  MR. LINSIN: Yes, your Honor.

19                  THE COURT: Okay. And we will break after  
20                  each argument for a short period of time. Are  
21                  there any preliminary matters?

22                  MR. MANGO: No, your Honor.

23                  MR. LINSIN: No, your Honor.

24                  MR. PERSONIUS: No, your Honor. Thank  
25                  you.

1                   THE COURT: Okay. I think we therefore  
2 are ready.

3                   Chris, if you would bring the jury in please.

4                   (Jury seated.)

5                   THE COURT: Good afternoon. Please have a  
6 seat. Okay. Are you looking for something?

7                   A JUROR: It was glasses. My eyeglasses.

8                   THE COURT: You have them or you don't?

9                   A JUROR: This is a second pair.

10                  THE COURT: Okay. You probably won't need  
11 the glasses to hear the attorneys is my view.

12                  But welcome back, again, ladies and gentlemen.  
13 And thank you for assembling promptly. We have  
14 been working through matters, and we are ready now  
15 for closing arguments. And soon you will be  
16 wearing the mantle of the judges of the facts. And  
17 I ask you though to, once again, reserve judgment,  
18 keep your minds open, keep focused on how important  
19 this case is to both sides.

20                  You are the determiner of the facts. Nobody  
21 has more information about this case than all of  
22 you do as a result of the presentation of the  
23 evidence in this case, which consists of the  
24 answers to the questions by the witnesses, the  
25 exhibits that have been received into evidence, and

1       the stipulations that have been entered between and  
2       among the attorneys in this case. You know this is  
3       an important matter and case to both sides. If you  
4       keep your minds open, that's my instruction to you,  
5       and you will start for the first time really  
6       discussing the case when you enter your  
7       deliberations. And that's when I ask you, once  
8       again, to respect each other's views, to focus on  
9       the application of common sense, experience, and  
10      intelligence. You know how many times I've  
11      mentioned that to you right from the outset in this  
12      case. But that's what it takes. It's not  
13      overwhelming.

14           You yet have to receive from me the completed  
15      instructions in the law which you are to accept  
16      without questioning the wisdom of the law. And  
17      I've been working very hard with the lawyers, and  
18      they're making every effort to make certain that  
19      the law that I present to you is not only correct,  
20      but will be of assistance to you in determining  
21      whether the government has satisfied its burden of  
22      proof on each essential element of the 19 crimes  
23      charged in this indictment.

24           As you know, the burden of proof never shifts,  
25      and each defendant is afforded the presumption of

1       innocence. And you are to consider each defendant  
2       separately on each count of the indictment, and you  
3       are to consider each defendant on your analysis  
4       individually each count, each defendant, of the  
5       essential elements and whether all of them for each  
6       count, each defendant has been proven beyond a  
7       reasonable doubt.

8           A lot has gone on in this case. You've heard a  
9       lot of testimony from witnesses. Thirty by our  
10      count. And I suspect that your eyes have been  
11      opened more than once, and you've learned a great  
12      deal, but all of that now has to be like every life  
13      experience, applied to the practicalities of the  
14      task ahead, and that is for you to decide this case  
15      unanimously by verdict on each of the particular  
16      counts in this particular indictment.

17           So soon you're going to be undertaking that  
18      duty that you affirmatively by oath represented  
19      that you were willing to do in an important matter  
20      in our justice system, and that's deciding this  
21      particular case.

22           What happens next are three closing arguments,  
23      if you will. And the procedure is very much like  
24      when we started this case. The government has the  
25      opportunity to open with its closing argument

1 first, and that's because it technically brought  
2 this case against the two defendants that you have  
3 come to know as Tonawanda Coke Corporation and Mark  
4 Kamholz.

5 We will take a break, brief, after the  
6 government's closing argument. Then we will resume  
7 with the two defense closing arguments. They will  
8 be separated by a break, a short break. I think  
9 the order will be Mr. Linsin, then followed by  
10 Mr. Personius. And then if everything comports  
11 with the rules, the government will have the  
12 opportunity to make what's called a rebuttal  
13 argument. And that would be -- I think the initial  
14 argument will be by Mr. Mango, and then  
15 Mr. Piaggione will wrap up the rebuttal argument  
16 for the government.

17 So that's what you have to look forward to.  
18 I'm confident that we can accomplish that this  
19 afternoon. Once that is done, then I will give you  
20 the balance of the law that you need to apply to  
21 decide this case. So, you know, I know you  
22 comprehend and understand how this all works now,  
23 and you in a sense have become experts in the trial  
24 process, and that's a good and positive thing.

25 You've heard me emphasize time and time again

1       only the evidence or the lack of evidence decides  
2       the case. Now you also heard me say that the  
3       closing arguments will be very different from the  
4       opening statements. And they will be designed to  
5       persuade you -- that's the attorney function in  
6       every case -- persuade you from the evidence or the  
7       lack of evidence whether the government has  
8       satisfied its burden beyond a reasonable doubt.  
9       But here's the caveat, and you know what I'm  
10      getting to. What the lawyers say and have said  
11      throughout out the trial, what? None of that is  
12      evidence. The evidence was produced by the  
13      witnesses, the exhibits, and the stipulations.

14           You have your notebooks. You can take notes if  
15      you choose to, but if you do, it's with the  
16      expressed understanding that it's a guide. It's  
17      not evidence for you to consider when you enter  
18      your deliberations.

19           Okay. Are you ready? All right.

20           That being the case, Mr. Mango, I believe you  
21      are ready to start. And you may sum for purposes  
22      of this case.

23           MR. MANGO: Thank you, your Honor.

24           THE COURT: You're welcome.

25           MR. MANGO: May I proceed?

1                   THE COURT: You may.

2                   MR. MANGO: To comply or to deceive, that  
3                   is the question. Now that question which I've  
4                   borrowed from Shakespeare in a modified form really  
5                   sums up the issues in this case. On several  
6                   occasions defendant Tonawanda Coke Corporation and  
7                   its manager of environmental control, defendant  
8                   Mark Kamholz, faced that simple question and had to  
9                   decide whether they were going to comply with  
10                  environmental laws designed to protect the very air  
11                  we breathe and the ground we walk on from dangerous  
12                  toxic and hazardous pollutants, or whether they  
13                  were going to engage in deception to avoid  
14                  compliance to save a buck. And as the evidence has  
15                  established during the course of this trial, time  
16                  and again the defendants chose to deceive, not  
17                  comply, all in an attempt to put profit ahead of  
18                  all else.

19                  Now, before we start getting into the counts of  
20                  the indictment, I'd like to just give you one  
21                  example of what I'm talking about. You've heard a  
22                  lot of testimony in this case, and you heard  
23                  testimony regarding something called a battery  
24                  flare stack. I want to start there, because that  
25                  puts, in the government's view, everything into

1 perspective.

2 You heard that this is a device used during  
3 times of emergency to vent the battery, to vent  
4 this coke oven gas, which contains benzene,  
5 naphthalene, sulphur, to vent it so the battery  
6 doesn't explode.

7 And as I go through my closing you're going see  
8 a number of slides here.

9 This is the battery flare stack as testified  
10 to. Now to really put this into context and how  
11 this relates to this case, there's some  
12 correspondence that you all saw. In 1993, October,  
13 Defendant Kamholz sends a letter to the EPA, 1993,  
14 and he says, I'm aware there's this new law. I've  
15 got to have a -- Tonawanda Coke has to have a  
16 battery flare stack on the system and, in fact,  
17 we've got to install it by March 31st of 1994.

18 He proposes some alternative option of using  
19 some collection of stand pipes to manually open the  
20 devices during an emergency. And he sends this  
21 into the EPA requesting an exemption from this rule  
22 that says you have to have a battery flare stack.

23 EPA responds back. December 30th of 1993,  
24 couple months goes by. They in essence say we've  
25 evaluated your request. It's denied. We don't

1 believe that it would adequately destroy the amount  
2 of coke oven gas going into the atmosphere. Coke  
3 oven gas going into the atmosphere.

4 On the third page of that document, EPA  
5 specifically tells him -- this is in the conclusory  
6 paragraph here. "A manually operated system would  
7 not be as reliable as a flare system for these  
8 brief venting episodes. An automatic system is  
9 much faster than using battery workers to vent the  
10 battery."

11 We're going to go through a lot of language  
12 that the government believes is very clear in this  
13 case and clear in the requirements it imposed on  
14 Defendant Kamholz and Defendant Tonawanda Coke  
15 Corporation.

16 Now, in light of that language, we've heard  
17 testimony from Anthony Brossack, from Gerry Priamo  
18 about this battery flare stack. You may have been  
19 wondering at the time, how does this relate, why  
20 are we even talking about this? The Judge read me  
21 the indictment before we started -- or the counts  
22 of the indictment. It relates because within at  
23 most a year, because those witnesses said it was  
24 '94, '95 that the pilot light went out, that the  
25 automatic system that was in place was not in

1 place.

2 So within a year Defendant Kamholz removes that  
3 natural gas and those witnesses told you why.  
4 Because he said it was too expensive. Natural gas  
5 is too expensive, and in response the witnesses say  
6 well, how are we supposed to light this? What are  
7 we supposed to do? And that man's response was  
8 grab one of those brooms you use to brush the  
9 battery top, light it on fire, throw it up, ignite  
10 the battery flare stack. It's exactly what EPA  
11 said don't do. Exactly. Do not -- use an  
12 automatic system. A manual system doesn't work.  
13 And you're not approved to use it. That's, in the  
14 government's view, uncontradicted testimony from  
15 the witnesses who took the stand. All for money  
16 because natural gas was too expensive.

17 Now, you've heard the Judge talk obviously with  
18 instructions yesterday and this morning, that  
19 whatever I say here today is not evidence.  
20 Whatever Mr. Linsin, whatever Mr. Personius says,  
21 that's not evidence. You've got the evidence.  
22 We're just trying to put a spin on the evidence.  
23 Okay. You've got it. And likewise aside from the  
24 closings, the openings that you heard, those aren't  
25 evidence.

1           But it's my practice I like to take notes  
2 during opening. I like to see what the defense  
3 counsel is going to say or what they believe  
4 they're going to show in their case.

5           And again my recollection is not determinate --  
6 determines your recollection. It's what you recall  
7 during openings that matters. But I recall  
8 Mr. Linsin saying something to the effect of money  
9 is no issue. This is a corporation. You're going  
10 hear the baffles cost \$125,000 to install, which  
11 you did. You heard that stipulation. Baffles in  
12 each tower cost \$125,000. That's a lot of money.  
13 But he said money's no issue.

14           But I submit, ladies and gentlemen, what the  
15 evidence does show in this case is that money was  
16 an issue. Money drove the corporation and  
17 Defendant Kamholz into this deception. And you've  
18 now got in evidence this Government Exhibit 120,  
19 which is the business plan for the fiscal year  
20 ending 2009.

21           And what better document than a confidential  
22 and proprietary document of the own corporation?  
23 Confidential and proprietary. This is for us only,  
24 except when EPA criminal agents go in and take it.  
25 And they did. And on page 16 under weaknesses,

1 significant environmental pressures include ongoing  
2 compliance with local, state, and federal emissions  
3 regulations. Eighteen, under risks, environmental  
4 risks. Economic, compliance with environmental  
5 mandates often involves substantial expenditures.  
6 This is their own document. They wrote this  
7 document. Money is an issue. It's clearly an  
8 issue. You wouldn't put it in a business document  
9 if money is of no concern to compliance.

10 Let's switch gears now, talk about the Clean  
11 Air Act and the Resource Conservation and Recovery  
12 Act. We spent a good three days in the beginning  
13 with the testimony of Mr. Carlacci going through  
14 the Clean Air Act, going through the self-reporting  
15 nature of the Clean Air Act, going through the  
16 requirements that are on corporations like the  
17 Tonawanda Coke Corporation, going through the  
18 requirements that are on the point of contact,  
19 Mr. Kamholz. And I submit as we go through these  
20 accounts, ladies and gentlemen, the evidence is  
21 consistent with the defendants' attempts to deceive  
22 inspectors and manipulate the regulatory scheme.  
23 Manipulate it for their own benefit.

24 You're going to hear some common terms when  
25 Chief Judge Skretny gives you the instructions

1 about the Clean Air Act. You're going hear about  
2 what it means to be an owner or operator, a  
3 required element in the Clean Air Act charges. The  
4 defendants need to be owners or operators of a  
5 stationary source of air pollution.

6 An owner or operator just simply means,  
7 obviously, someone who owns the company, which the  
8 corporation does. But in the case of Defendant  
9 Kamholz it includes anyone who controls or  
10 supervises the stationary source.

11 There's now, as the Judge mentioned, 30  
12 witnesses who've testified, a number of which  
13 talked about Defendant Kamholz's responsibilities  
14 at the corporation. You've got a number of  
15 documents where he signed -- he signed his name --  
16 we're going to go through one in a minute -- where  
17 he certifies that everything is true, accurate, and  
18 complete. He is the one who is supervising, who's  
19 in control of this stationary source.

20 I want to start my discussion of the counts  
21 with Count 6 through 10 of the indictment. And if  
22 you remember, that -- those counts of the  
23 indictment relate to quench tower number 1, that's  
24 the west quench tower, deals with condition 96 in  
25 the Title V permit. And the time period in play is

1       July 29th of 2005, which, when you get the  
2       indictment -- it's not evidence -- but look at it.  
3       That's exactly five years to the day before the  
4       indictment is returned, to December 31st of 2009.  
5       And December 31st of 2009 we know from a letter in  
6       evidence, Government Exhibit 19.16, that baffles  
7       were reinstalled in this quench tower number 1 in  
8       January. That brings us all the way through  
9       December.

10       And you saw a picture of the quench tower,  
11       number one tower, which was taken during the  
12       execution of the criminal search warrant. And  
13       it's -- it's the government's position that there  
14       really is no dispute that this quench tower did not  
15       have baffles going back at least since 1983, 1984.  
16       And obviously you've heard about that. We'll talk  
17       about that in a minute.

18       You saw from the inside on that day, on  
19       December 1st, 2009, during the search warrant,  
20       there were no baffles in the quench tower. Again,  
21       it's the government's position we're not here to  
22       talk about whether there were or were not baffles  
23       in the quench tower.

24       But we are here to talk about the defendants'  
25       deception towards the regulatory agencies involved,

1 which begins for this count on September 19th of  
2 1983, where he says, and he gives the principle  
3 reason for why he's asking not to have baffles in  
4 that quench tower, cost too much.

5 So, a month ago when you heard it, money is not  
6 an issue, and in 1983 money was an issue. The  
7 physical size of the exit would require very  
8 significant sums of capital to produce the  
9 60 percent control.

10 The next page, he ends the letter by saying he  
11 believes that quench tower number 1, the lack of  
12 baffles, is de minimus. We're going to talk about  
13 de minimus. It's a word now when we fast forward  
14 into 2009 that comes back into play.

15 So, you've learned DEC granted that exemption  
16 March 14th, 1984. This is Government  
17 Exhibit 19.17. They specifically say, "Please note  
18 the condition on the operating certificate that  
19 limit the use of the quench tower to less than  
20 10 percent of the time." You have that, that Air  
21 100. I'm not going to go through it. I would be  
22 here for hours if I tried to go through everything.  
23 But you have that Air 100. You're going to see it  
24 in the deliberating room, and on the bottom it will  
25 say not to be used more than 10 percent -- or ten

1 percent or more of the time.

2 Now fast forward to 1997, December of 1997.

3 Again, based on what you heard from Mr. Carlacci  
4 and Mr. Sitzman, this whole new regulatory world  
5 goes into play, that's Title V. That's the Clean  
6 Air Act. In December of 1997 Defendant Kamholz is  
7 responsible for applying for the Title V permit.

8 And no doubt -- no doubt Defendant Kamholz included  
9 in his application the request to continue this  
10 exemption. And now you've seen that the draft  
11 permit got issued. The exemption wasn't in it.

12 Tonawanda Coke, Defendant Kamholz commented on that  
13 draft permit. No mention of quench tower number 1.

14 Likewise in 2006 there is a renewal application  
15 submitted. That's Government Exhibit 18.06.

16 There's nothing in that regarding the exemption.

17 And the issue in play in Count 6 to 10 really is  
18 that exemption. Because you heard DEC witnesses  
19 Mr. Sitzman, Mr. Carlacci, say that our view of  
20 condition 96 of the Title V permit would  
21 incorporate this exemption.

22 So your duty is to think about well, did they  
23 use this tower 10 percent or more of the time  
24 during the relevant period, 2005 to 2009? And  
25 you've heard from a number of witnesses now on that

1 point that during the relevant time, those  
2 witnesses who did work at Tonawanda Coke said that  
3 both towers were used in an alternating fashion.

4 If you remember the testimony of Frank  
5 Gonzalez, the battery foreman or battery  
6 supervisor, he testified. Even under his math with  
7 eight oven pushes in a shift, the west tower is  
8 used one to two times. Even one time out of eight  
9 pushes that's more than 10 percent of the time.

10 You heard the testimony of Sean Hoffmann and  
11 Dan Heukrath. I'm not going to pretend that didn't  
12 happen, where they testified that there was a  
13 period of time that the west quench tower was  
14 closed off, it was out of service. And you heard  
15 from other witnesses about the length of that time.  
16 And I submit to you the testimony was somewhere  
17 between six months to two years.

18 But the indictment charges five years, five  
19 counts, five years. And, in fact, it's my  
20 recollection that both Mr. Heukrath and  
21 Mr. Hoffmann said that sometime in 2008 the west  
22 tower came back online. And from that point on it  
23 was used in an alternating fashion. In fact,  
24 Mr. Hoffmann said that the east tower, which we'll  
25 talk about in a second, that was down. He gave

1       dates, again in my recollection -- it's your  
2       recollection that controls of the testimony --  
3       January to May of 2008. The east tower was down  
4       completely. Quench tower number 1 used all the  
5       time. They got to quench the coke. They got to go  
6       somewhere. They got to pour water on it.

7           Let's move to the east tower, number 2 tower.  
8       That relates to Counts 11 through 15 of the  
9       indictment. And those charge the defendants with  
10      using that tower. That tower had no exemption.  
11      That tower had to have baffles a hundred percent of  
12      the time. All the time.

13       When that tower from 2005 you look, the charge  
14      starts July 29th, 2005, five years prior to the day  
15      of the indictment, up until November 15th of 2009.  
16      If you remember there's now an exhibit in evidence,  
17      that's Exhibit 19.15, where Tonawanda Coke sends in  
18      a letter, and says we've reinstalled baffles in  
19      this tower.

20       You saw a photograph of this tower. Again,  
21      taken during the criminal search warrant. And as  
22      you know, the story begins in 1996. Because in  
23      1996 that is when Defendant Kamholz, again, began  
24      his scheme to deceive the regulatory agency.  
25      Because in that letter he talks about how he wants

1 to lower the height of the tower. That's it. We  
2 anticipate operating number 2 quench station in its  
3 modified form, and request your concurrence to this  
4 modification. The word "baffles" doesn't appear  
5 anywhere in this letter. It's no where.

6 So in response -- again, you've seen this.  
7 Government Exhibit 19.12 -- DEC sends a letter  
8 back. It's very clear. It should be noted that  
9 Part 214.5(a) -- that's the New York Codes Rules  
10 and Regulations, which you've heard of -- says  
11 explicitly all wet quench towers have to have  
12 baffles. We're reminding you of that. That's it.

13 So at that point, ladies and gentlemen, that  
14 point in time, 1996, '97, they had a choice, to  
15 comply with the law or to deceive. And from what  
16 we've heard, we know the choice was to deceive.

17 And I say defendants at this point. I just  
18 want to briefly touch on this. You've heard this.  
19 You've heard this from the Judge yesterday about  
20 responsible corporate officer, that based on his  
21 duties he was the person that was the responsible  
22 person for this facility. It's similar to this  
23 owner-operator definition.

24 You also heard about the definition of  
25 corporate responsibility. That corporations are --

1 can be liable for the actions of their employees.

2 And that's how we have both Defendant Kamholz and  
3 the corporation involved in this case.

4 And, again, with this tower, my notes suggest  
5 that it was mentioned during opening by Mr. Linsin,  
6 I suggest there's really no dispute whether this  
7 tower had baffles or not. I believe there's no  
8 dispute it did not have baffles. My notes say that  
9 Mr. Linsin mentioned that during opening. And  
10 you've now heard the testimony from a number of  
11 witnesses. There were never baffles in this tower  
12 after '96, '97 time period. Mr. Priamo mentioned  
13 that.

14 I don't want to go through the testimony about  
15 baffles in or out. What I want to focus on is Gary  
16 Foersch, the defense witness. The person called by  
17 the defense in their case.

18 My notes, again, suggest that Mr. Linsin said  
19 something to the effect of you're going hear from a  
20 DEC inspector, and I would presume that's  
21 Mr. Foersch, who was out there from 1996 to 2009,  
22 knew there were no baffles in quench tower number  
23 2, knew it was a violation, but never wrote up the  
24 corporation, never said anything.

25 Okay. Now you've heard his testimony. That's

1 not what he said. He didn't say that at all. He  
2 stated that he brought the lack of baffles or  
3 missing baffles, he couldn't remember, he brought  
4 that up during one of his inspections because one  
5 time he decided to go into this dangerous place as  
6 he testified to, where there's electric rails,  
7 where there is water pouring out possibility. You  
8 climb down a little slope, he looked in, and he  
9 said there's problem there.

10 Defendant Kamholz, you know, Part 214.5  
11 remember that? That requires baffles. Okay.  
12 There was nothing at that point.

13 Mr. Foersch testified Mr. Kamholz didn't say  
14 well, you know, the upward velocity. Don't  
15 really -- this tower, should ignore, you know,  
16 baffles. There was none of that. It was just an  
17 acknowledgment. Yup, okay.

18 So again, I'm trying to focus on all these  
19 choices, these times when that decision to comply  
20 or deceive came up. Here's another chance. He had  
21 the choice. He could have complied. He could have  
22 put the baffles in the tower, but he chose to  
23 deceive. And then you also heard testimony from  
24 Mr. Foersch that not only did he raise that the  
25 year later when he went back during his full

1 compliance inspection, he didn't look in the tower,  
2 but as he's walking out, finished with his  
3 inspection, he says something to the effect, hey,  
4 did you put baffles in that tower? And again there  
5 was that choice, that chance. Come clean.

6 Defendant Kamholz could have said well, you  
7 know what, it's too cost prohibitive, we haven't  
8 had a chance to do it yet. He could have said  
9 that. Mr. Foersch, said yes, we put them in. Yes,  
10 he made that choice. He chose to deceive. He  
11 chose in this case to roll the dice, to roll the  
12 dice that DEC was never going to go back there and  
13 look.

14 You may hear an argument, I expect you'll hear  
15 an argument that well, Mr. Foersch, he didn't  
16 really believe Defendant Kamholz at that time. Who  
17 cares? What does that matter? Everything that was  
18 communicated, the statements or conduct which  
19 you're going hear about -- I'm using these terms  
20 deliberately -- because you're going to hear about  
21 this term entrapment by estoppel. I have it under  
22 something else I want to talk about.

23 These statements or conduct that is sent over  
24 to the defendants is you got to have baffles, and  
25 did you put them in. That's it. It wasn't hey, I

1 really don't believe you, but it's okay. That  
2 didn't happen. So the fact that Mr. Foersch either  
3 didn't follow up or didn't believe Defendant  
4 Kamholz, it's irrelevant. It doesn't matter.

5 Now, there's an interesting thing that happened  
6 in April of 2009. And we're going to talk about  
7 that as well. That's that EPA -- joint EPA/DEC  
8 inspection. And we'll get there, we'll talk about  
9 why this inspection comes up. But at that point  
10 quench tower number 2 becomes an issue. You heard  
11 it from Mr. Sitzman.

12 He finds out there's no baffles in the tower.  
13 He talks to Defendant Kamholz. He says, hey,  
14 what's going on? You're supposed to have baffles.  
15 Remember those letters? Yeah, I remember those  
16 letters. Did he say, well, Gary told me I could?  
17 No. No, he didn't say anything. He didn't say  
18 anything. Think about that.

19 I mean, my own daughter does it to me and my  
20 wife. If I tell her something but my wife tells  
21 her something else, well daddy told me I could do  
22 it. I got that this weekend actually. That's  
23 ingrained in us since we're little. If somebody  
24 tells you it's okay to do something, and then  
25 somebody else comes along and says why did you do

1       this? It's common sense. You're expected to use  
2       your common sense.

3              Similar to the April of 2009 inspection and any  
4       lack of response by Defendant Kamholz. We have  
5       this letter in evidence, Government Exhibit 126,  
6       which is the request for information sent by the  
7       EPA following this inspection. Significant  
8       document which we'll talk about in another context.  
9       And says, you know, Defendant Kamholz, we really  
10      need some more information about your facility.  
11      They send it to him, the owner-operator. They  
12      specifically ask about baffles.

13             It doesn't get any clearer than 8(a). State  
14      whether the quench towers have any baffles. If  
15      your answer is no, explain why not. Another  
16      chance. Another chance for him to say -- to make  
17      that choice, that compliance choice. But instead  
18      he chose to deceive. He had the chance again to  
19      say, you know what, Gary told me I could do it. He  
20      didn't do that. Here's the letter that he sent  
21      back.

22             In the section -- this is the certification I  
23      wanted to talk about. In the letter he sends back  
24      he says I believe that the submitted information is  
25      true, accurate, and complete, and that all

1 documents submitted with this response are complete  
2 and authentic unless otherwise indicated.

3 He's on the hook. It goes on to say there's  
4 significant penalties, including imprisonment. He  
5 knows what he's doing. And he says the quench  
6 towers are not baffled. They're not traditional  
7 quench towers. They're short. The upward  
8 velocity, we've heard that. And we heard about  
9 foundry coke. This is the chance to say Gary told  
10 me I could do it. He doesn't do that. And the  
11 reason is because it never happened.

12 Gary never said, Gary Foersch I'm talking  
13 about, never said you can operate without baffles  
14 in that tower. You heard his testimony.

15 Okay. Let's move on to the bleeder valve.  
16 These are Counts 1 through 5 of the indictment.  
17 And those counts charge the defendants with  
18 operating an unpermitted emission source in  
19 violation of their Title V permit. That's  
20 condition four. We went through it, again, three  
21 days of testimony with Mr. Caracci, I think two  
22 days of testimony with Mr. Sitzman. I think you've  
23 got it. I think you know what we're talking about.

24 And we've also heard this called the bleeder  
25 valve, the pressure release valve. It's in

1 by-products. And a period of time, again  
2 July 29th, 2005, five years from the time of  
3 indictment, up to December 30th of 2009. Because  
4 we know or you've heard from the testimony of  
5 Mr. Cahill that that bleeder was taken out of  
6 service in March of 2010. So it's -- so the charge  
7 brings it all the way up to the end of December.  
8 And you've seen a number of photographs depicting  
9 this bleeder.

10 I want to focus on this one, Government  
11 Exhibit 50, which you heard testimony of. You saw  
12 people point it out, there it is. Does it appear  
13 to be releasing? That's your call. I don't know  
14 if there was testimony or not on whether it was  
15 releasing, but you could look at that. You could  
16 use your common sense.

17 A number of witnesses testified on this bleeder  
18 valve. They testified about during reversals gas  
19 would back up in the coke oven. It wouldn't flow  
20 to the coke oven. Pressure in the line would  
21 increase. This device was set to relieve that  
22 pressure. You heard about the general set point of  
23 the bleeder from 80 to 100.

24 Witness after witness testified we set it at 80  
25 to 100, somewhere in that ballpark. And when the

1 pressure would go above that, a signal would get  
2 transmitted to the valve, it would open, coke oven  
3 gas would go into the atmosphere.

4 You learned about where the set point was in  
5 this green shack just below it, that changes to the  
6 set point weren't made that often. You heard  
7 testimony from a number of witnesses on that. They  
8 didn't adjust this that often. And it would  
9 generally release during reversals, and when it  
10 would you heard it would go anywhere from five to  
11 30 seconds blowing coke oven gas into the  
12 atmosphere. Some times it would be longer.

13 You heard from a witness who was actually  
14 working when it caught fire. You've now had an  
15 entry you see in the log book that's included on  
16 that summary chart -- we'll get to that in a  
17 minute -- that caught on fire in 2008. And the  
18 result of that was a 10-foot high flame, like a  
19 blow torch into the air.

20 Now, you also heard testimony from Mr. Heukrath  
21 and I believe from Mr. Cahill, it's my  
22 recollection, that at some point in the 1980s the  
23 bleeder was set there. It was in a different  
24 location.

25 There's really three main elements of these

1 counts that I want to discuss, that the defendants  
2 operated this bleeder in violation of a permit  
3 condition, and knowingly. So operation in  
4 violation of a permit condition and knowingly. So  
5 at the close of the government's case in chief,  
6 that was before the defense started their case, you  
7 heard from Special Agent Conway. He presented this  
8 summary chart which included a summary of all the  
9 by-products operator log books and the bleeder  
10 charts. And certainly there's no dispute that this  
11 chart is only as good as the documents that it  
12 relies upon. And that there's clear discrepancies  
13 in the log book. Bleeder being lowered to 94, with  
14 the setting before it it was at 90.

15 But the important -- there's important parts of  
16 this log book you have to take away. That except  
17 for the last entry and one entry in February  
18 of 2008, it was consistently set at 80 to 100  
19 centimeters. Highest setting ever was recorded on  
20 May 22, 2009, which occurred after the April  
21 of 2009 inspection. When we've heard now that  
22 defendants were asked to raise this, this chart  
23 bears that out.

24 Now, with the discrepancies in this chart, even  
25 if we just limit ourselves to those three days that

1 I have bracketed there that we have bleeder charts  
2 for, you saw all those circular bleeder charts.  
3 Just even focusing on those three days, March 2nd,  
4 March 3rd, and May 22nd, well, you saw Government  
5 Exhibit 203 in evidence, where on March 2nd of 2009  
6 it was set at 94 and based on that bleeder chart,  
7 there were 49 releases, just over every half hour.

8 The next day it was raised to 100. There's  
9 actually 51 releases. If we go to the May 22nd,  
10 the next entry, which says raised to 110, there is  
11 48 again, consistent with every half hour during  
12 reversals. This evidence coupled with the  
13 testimony of the witnesses you've heard, a number  
14 of them, this bleeder would release frequently.

15 In fact, you heard from near the end of the  
16 government's case Dan Heukrath, who said  
17 between 2005 and 2009 he saw this release thousands  
18 of times. Thousands. So I submit to you that  
19 based on that evidence, there's no doubt that the  
20 defendants operated this bleeder valve.

21 Now, violation of a condition of the permit.  
22 This deals with condition number four. You're  
23 going to hear some terms during the definitions  
24 when you're instructed on the law about emission  
25 source. I don't know if you remember that

1       testimony, emission source versus emission point,  
2       construction, modification, a process, what all  
3       that means. But what is clear, I would submit  
4       based on the testimony, is that you heard this  
5       bleeder is an apparatus. Al Carlacci testified to  
6       that. Larry Sitzman testified to that. And under  
7       the definitions you're going to get from the Judge,  
8       an emission source is any apparatus or contrivance  
9       or equipment that can cause emissions into the air.  
10      That's exactly what we have. There it is. There's  
11      the apparatus.

12           Now, the last element of these counts I want to  
13       talk about is knowingly, because you've got to show  
14       that the defendants acted knowingly. You're going  
15       to hear about what knowingly means in the Clean Air  
16       Act. But it doesn't get any more knowingly than if  
17       you recall the testimony of Gerry Priamo, who said  
18       he had conversation with Defendant Kamholz 15 to 20  
19       years ago in the vicinity of this very apparatus,  
20       and says hey, Defendant Kamholz, is it legal to  
21       bleed gas here like this? Does it need to be lit?  
22       The defendant had a choice. He chose to deceive  
23       his own employees and said it's legal, don't worry  
24       about it.

25           Same with Anthony Brossack. You heard from

1 him. He had a conversation more regarding the  
2 condensate that was coming out of this. Again, a  
3 long time ago. There was condensate coming out,  
4 and he asked, hey, is the bleeder all right to do  
5 this? And Defendant Kamholz's response was yeah,  
6 it's supposed to do that.

7 And finally, in terms of knowingly, we've got  
8 Pat Cahill's testimony, which I want to hold on and  
9 talk about that in a moment.

10 Now, I expect you're going to hear about this  
11 entrapment by estoppel defense. It's really a  
12 defense, and it's a defense the defendants have to  
13 prove. They have to prove it. And you heard some  
14 testimony regarding this document, Government  
15 Exhibit 131, this HAPS study. And defendants have  
16 challenged some of the government witnesses arguing  
17 that the report provided notice to the DEC. And we  
18 saw this chart with the coke oven gas system, a  
19 pressure relief valve, listed one, that somehow  
20 this was notice.

21 I have no other argument than this is complete  
22 nonsense. You heard about the process to make  
23 notice. It doesn't include a reference which in  
24 the footnotes itself identifies this as a leaking  
25 valve based on the emission factors that you heard

1 from Mr. Sitzman. But moreover, does it describe  
2 where it is?

3 This coke oven gas system, you've now seen  
4 charts, the length of these pipes. It doesn't say  
5 where it is. Does it say what it looks like? No.  
6 And again, how often it releases? Well, the  
7 footnote says it doesn't release that often. It's  
8 a leaking pipe. And then on the next page, the  
9 very important question, the most important  
10 question out of this, how much benzene is coming  
11 out of it? A big zero.

12 So this, ladies and gentlemen, this tells you  
13 nothing. Nothing. This can't be notice. If this  
14 is notice, think about when you -- it's almost  
15 middle of April. We've got to submit our taxes,  
16 got to make an accounting of how much income you've  
17 earned, put it on a 1040, send it in to the IRS.  
18 You say how much income you've earned. You're  
19 giving them notice of how much tax due and owing  
20 you have based on the amount of income you have.

21 Now think about instead, you send -- you  
22 electronically file your -- your income statement,  
23 your tax return. You electronically file it. I  
24 expect that's what most of us do now. But at the  
25 same time you write a letter out to the IRS, oh, by

1       the way, dear IRS, I have another job. You put it  
2       in the mail and you send it in. Would that be  
3       notice?

4           What if in that same letter on the most  
5       important question it says I earned zero income.  
6       Think about it that way. That letter would be  
7       meaningless. It's nonsense. That this could be  
8       notice to the DEC is nonsense.

9           Proper notice of an emission source is not  
10      burying it in some unintelligible chart that you  
11      heard testimony of really isn't reliable anyways.  
12      This is not notice.

13           Now you've also heard testimony from the  
14      defendants that this bleeder was open and obvious.  
15      That it wasn't shrouded in a veil I think was --  
16      was the -- one of the questions. No, there was no  
17      veil draped around it.

18           So, in essence, what they're telling you, what  
19      they're going to imply I expect in closing is that  
20      well, although DEC didn't catch us, they should  
21      have. They should have, because we didn't put a  
22      veil around this. We didn't hide it. We didn't  
23      drape a sheet over it every time they showed up.

24           But when you think about that argument, you got  
25      to think, is that how the law works? Think for a

1 moment about a serial bank robber who alludes  
2 detection by police on a number of occasions, robs  
3 a number of banks, but then finally is caught. On  
4 one of the final attempts he's caught. And then  
5 there's evidence produced during maybe a search of  
6 his apartment of these earlier bank robberies.  
7 Does the fact that the police missed it somehow  
8 absolve that bank robber of those earlier crimes?

9 Think about this. How about in the Ponzi  
10 scheme. Probably heard Bernie Madoff in the news  
11 in the past. Think about someone is operating a  
12 Ponzie scheme, and it goes undetected by the agency  
13 that's supposed to detect it, which is the  
14 Securities and Exchange Commission. Even though  
15 they should have caught on, the tell-tail signs  
16 were there, they should have caught it. If the SEC  
17 later determines that this is truly a Ponzie  
18 scheme, does that mean they're precluded from  
19 taking any action? The answer is no. The law  
20 simply does not work that way.

21 This is not monopoly. There's  
22 no-get-out-of-jail-free-because-they-missed-it  
23 card. That doesn't apply. Even if you want to  
24 conclude that DEC missed it, that's fine. I can't  
25 argue with that. But in the context of this case,

1 and in the entrapment by estoppel defense that the  
2 Judge is going to tell you about, you've got to  
3 think to yourself it really has no bearing.

4 Because for this entrapment by estoppel defense  
5 to apply, which the defendants have to prove,  
6 that -- they have to show that the defendants --  
7 I'm sorry, that the government caused the  
8 defendants to commit the crimes by leading the  
9 defendants to reasonably believe they could commit  
10 the crimes. Reasonably believe. Defendants must  
11 show they relied on statements or conduct of the  
12 defendant, and, very importantly, and they must  
13 show that they reasonably disclosed this conduct at  
14 or time [sic] the authorization from the  
15 government. That's a very important statement.

16 You heard this bleeder's been around for years,  
17 since the '80s. That's why I say the 2003 report  
18 is nonsense. Because under an entrapment by  
19 estoppel, back in the '80s when they were using it,  
20 they've got to give notice then. They've got to  
21 tell the government, hey, we're going to be using  
22 this to vent coke oven gas in the atmosphere. Not  
23 decades later.

24 Those are the Clean Air Act charges in the  
25 indictment. And I submit to you that based on the

1 evidence presented, you should find the defendants  
2 guilty of all those charges.

3 Now we're not done there. We've got to talk  
4 about the RCRA charges. And as you heard with the  
5 government's last witness, the government attempted  
6 to present you and through Mr. Flax his opinion as  
7 to the concepts relevant to Counts 17 to 19. And  
8 with Count 17 we're talking about storage, storage  
9 of a RCRA hazardous waste. And I submit to you --  
10 again, I'm trying to focus on what the government  
11 believes are really the key issues.

12 I submit to you that the only real issue in  
13 dispute here with Count 17, which you heard from  
14 Miss Williams who testified, Mr. Flax,  
15 Mr. Strickland is whether the defendants actively  
16 managed this material. Did they actively manage  
17 it?

18 The Judge is going to give you a very  
19 straightforward definition of what active  
20 management means. And I expect it's going to  
21 include something to the effect of disturbing  
22 accumulated waste. Disturbing. As you evaluate  
23 that language, "disturbing accumulated waste",  
24 you've got to think about the tanks and the  
25 material around the tanks on the ground.

1           Let's start with the tank to the east. It's  
2 Government's Exhibit 105.40, which has been  
3 stipulated, if you remember the stipulation, was  
4 taken on April 21st of 2007. So 2007 there's two  
5 tanks standing.

6           Moving into July of 2008 one tank is down.  
7 Moving into June of 2009, from the testimony of  
8 Mr. Corbett who was there who took this photo,  
9 that's the tank. If you go back where the tip of  
10 that arrow is, I don't know if you see the piece of  
11 metal sticking up that's almost like a right angle.  
12 I submit to you you see it in that photograph too.  
13 Then you've got a stipulated photograph from  
14 September 10 of 2009. This is Government  
15 Exhibit 136.11. This is from the sampling event.

16           There can be no doubt, ladies and gentlemen,  
17 that what you've seen in these photographs, the  
18 ground around these tanks, this tank in particular,  
19 has been actively managed. You've got to think  
20 about the testimony you heard. The witnesses who  
21 testified they drove over the material with heavy  
22 equipment. They disturbed it. It's very simple.

23           RCRA may sound complex, but when you think  
24 about the definitions the Judge is going to give  
25 you, they disturbed it. They drove over it. They

1       poured coke breeze on it. They dumped more coke  
2       breeze on it that caused it to move. They drove  
3       over it with heavy equipment that caused it to  
4       move. Material flowed out of this tank, which,  
5       part of the definition you're going to hear about  
6       active management is whether additional material  
7       comes on top of it.

8           Let's look at the tank on the west, again,  
9       stipulated April 21st, 2007. The time of the fire  
10      July of 2008, tank still standing. Sometime  
11      between July of 2008 and June of 2009 when  
12      Mr. Corbett's there, this tank comes down. Then in  
13      September when they're doing sampling there,  
14      stipulated photo 136.04, sampling of tank on the  
15      left. Tank to the west. There's no question in  
16      these photographs that the defendants actively  
17      managed the ground around the tank on the west.

18           You've got evidence which is apparent from  
19       these photographs -- you'll have a number of  
20       photographs to look at that -- that there's fresh  
21       spills. This material is flowing out. And you  
22       also have evidence now that this was toxic for  
23       benzene. Toxic and remained on the ground.

24           Let's go back to this chart and I'll talk  
25       briefly about Counts 18 and 19, that's the disposal

1 of a RCRA hazardous waste. And both of those, if  
2 you really simplify all the testimony, involve  
3 mixing somehow with coal on the ground. Well, I'll  
4 talk about ground in a minute.

5 So, that seems to be -- again, I'm trying to  
6 I'm trying to clarify this -- seems to be in the  
7 government's view the key issue, whether that  
8 mixing was appropriate in the coal piles on the  
9 ground.

10 So you heard about this ground, defense exam of  
11 the government's witnesses as to what does ground  
12 mean. Does the fact that there's coal, years and  
13 years of coal accumulated on the ground, does that  
14 mean it's not the ground? No. You've got to use  
15 your common sense. The fact that there's a layer  
16 of coal doesn't mean the coal is not the ground.  
17 You heard testimony about the ground is the surface  
18 of the earth.

19 You probably walked across some street to get  
20 here, probably Delaware, maybe Niagara Square,  
21 which I guess would be Delaware, so it's all  
22 Delaware, unless you maybe walked across Niagara  
23 Street and came on the sidewalk. At some point you  
24 walked across a street today. And at that point if  
25 somebody asked you where you were walking, do you

1 think you have to do mental gymnastics to say well,  
2 I'm really walking on blacktop, that's on top of  
3 gravel, that's on top of soil, which is on top of  
4 the ground. That makes no sense. You don't have  
5 to do that. You walked on the ground. That's  
6 where you walked. The surface of the earth, that's  
7 where the coal is.

8 All right. To come to terms with this mixing  
9 on the ground, you've got to listen to the  
10 definitions the Judge is going to give you about  
11 disposal under RCRA, what it means, disposal. You  
12 heard some testimony from the experts. And land  
13 disposal. And I submit when you hear those, again,  
14 it's not going to be difficult to tackle these  
15 issues. RCRA is not that complicated when you get  
16 very clear definitions. And those definitions are,  
17 for both of those, simply if you place something on  
18 the land so that it may enter the environment,  
19 that's the key word, may enter the environment,  
20 that's disposal. That's land disposal.

21 You don't have to be worried about whether it  
22 actually did enter the environment. It may. It  
23 may enter the environment. You've heard that  
24 there's no -- no way -- there was no containment  
25 out in the coal field to stop this K087 waste and

1       this D018 waste from getting flushed out of the  
2       coal field.

3           And you heard about a direct surface water  
4       connection to the Niagara River. Runoff, snow melt  
5       comes off the coal piles, runs down ditches, heads  
6       out to the Niagara River. It may enter the  
7       environment.

8           Now, you heard from a number of witnesses -- I  
9       guess maybe part of it was the parties made RCRA a  
10      little complicated. The government called two  
11      experts, defense called an expert, we called a  
12      rebuttal expert. But you also heard -- again, this  
13      is my notes from opening -- Mr. Linsin talked about  
14      this other expert you may hear from, a Steven  
15      Johnson, who would talk about RCRA and give you  
16      some opinions. We didn't hear from him.

17           So all you have from the defense is the  
18      testimony of Miss Williams, a witness who's never  
19      done a RCRA inspection in her life, a witness who's  
20      never been to the Tonawanda Coke Corporation, so  
21      she's never physically seen the coal field, a  
22      witness who, according to my notes during direct,  
23      said she spent about 200 hours working on this  
24      case. And on cross-examination with Mr. Piaggione  
25      said she billed \$475 an hour, which comes out to

1       \$95,000 is what her and her firm were paid for what  
2       you heard on the stand. And I submit that that  
3       \$95,000 opinion is in direct conflict with the  
4       definitions the Court's going to give you, that it  
5       may enter the environment.

6           And, in fact, let's take a look at after the  
7       search warrant gets executed, there was a question  
8       I believe what was happening now with the coal  
9       field -- with the K087 waste. Well, that may not  
10      have been relevant, but what was relevant was what  
11      happened right after the criminal search warrant?  
12      On December 17th after having civil regulators come  
13      in, look at the material, sample it, then the  
14      criminal inspectors come in.

15           The criminal agents execute their search  
16      warrant, and then the light goes off. You know  
17      what, we probably shouldn't be putting this on the  
18      ground. There is a policy change. No more  
19      material on the ground. In fact, you heard I  
20      believe from Mr. Dahl that sometimes it went on the  
21      pad in the past. Sometimes it went out to the  
22      field. After December 17th of 2009? No, they  
23      changed. I'd submit to you because they knew what  
24      they were doing was wrong. They built the pad in  
25      1994. You heard the regulations came into effect

1       in 1992. Put it all together. Use your common  
2       sense. I submit to you they knew what they were  
3       doing was wrong.

4           Now at this point I'm moving along. I want to  
5       just thank you for your service. A month ago to  
6       the day you were brought into this courtroom,  
7       probably never expected to be sitting where you're  
8       sitting now. And I appreciate -- I know on behalf  
9       of the government I appreciate your attention, the  
10      questions, the way you've approached this case,  
11      it's -- it's really a commendable -- the most  
12      commendable public service is what you ladies and  
13      gentlemen are doing right now. And I couldn't even  
14      fathom being just taken out of my normal day and  
15      having to sit in that box for 30 days, and so I  
16      thank you. I thank you for your patience and your  
17      time in this case.

18           Now the one thing -- the one count I haven't  
19      discussed yet is the obstruction of justice count.  
20      And that's the last count we're going talk about  
21      here. That's Count 16. Because that gets back to  
22      this practice, this decision, the choice to comply  
23      or deceive. And that charges Defendant Kamholz  
24      with obstruction of justice in the instruction that  
25      he gave Mr. Cahill who you heard on the stand prior

1 to the EPA inspection. And that was if you  
2 remember the testimony with reference to the  
3 bleeder, they were walking around prior to this  
4 inspection, and Defendant Kamholz said -- again,  
5 this is my recollection, my notes of what  
6 Mr. Cahill said, "Pat, we can't have that going off  
7 while they're here." And he was questioned on  
8 cross-examination about whether that was "they're  
9 here" or not, and he said, "Yeah, I recall to this  
10 day he said, we can't have that going off while  
11 they're here." That's the -- and in response Pat  
12 Cahill says, "Okay, I'll take care of it."

13 Now I believe there was questioning of  
14 Mr. Cahill about well, you know, Defendant Kamholz  
15 never told you hey, every day adjust it up, adjust  
16 it down, adjust it up, adjust it down every day, he  
17 never told you that, did he? No. No. Again, this  
18 is your common sense, ladies and gentlemen, is --  
19 when we come into the courthouse we've got to check  
20 certain things. We've got to check our cell  
21 phones, electronic devices. The one thing you're  
22 not supposed check is your common sense.

23 In fact, the Judge has already told you you can  
24 use your common sense. You're expected to use your  
25 common sense, and at the moment that Mark Kamholz

1       says "Pat, we can't have that going off while  
2       they're here", and Pat Cahill says, "Okay, I'll  
3       take care of that", you don't need any  
4       extraordinary leaps of imagination to know that  
5       Mark Kamholz knew what Pat Cahill meant by "Okay,  
6       I'll take care of that."

7           This is kind of crude analogy, but think of  
8       Rocky and I, we are out on the street, and we're  
9       hit men, and Rocky gives me a gun and says, "Hey,  
10      go take care of him." And I say, "Okay, I'll take  
11      care of him" and he hands me a gun. I know what  
12      he's telling me to do. I don't need him to say  
13      okay, make sure you're there at night, wait in your  
14      car, stay on the street, wait for the person to  
15      come out the stairs, follow him to a deserted  
16      place, shoot him, then throw away the gun, and then  
17      run away. I don't need that. Just like Defendant  
18      Kamholz didn't need that. When Pat Cahill said,  
19      "Okay, I'll take care of that", everybody knew what  
20      was going on.

21           And so this testimony Mr. Cahill said was the  
22       Friday before the inspection. Now, if you remember  
23       the testimony, the Tuesday -- April 14th, Tuesday,  
24       was the beginning of the inspection, so if you go  
25       back, that Friday was April 10th. April 10th,

1 2009.

2       And you're going to get legal instructions on  
3 this count. And there's really three major  
4 elements. I'm going to step through them all,  
5 because I think we need to just discuss briefly the  
6 first two, that the first element you're going hear  
7 about is was a proceeding pending? So was there  
8 some type of proceeding, some government  
9 proceeding, and was it pending at the time Mark  
10 Kamholz gave that instruction? That's a required  
11 element.

12      And if you remember the testimony of  
13 Miss Hamre, she testified that on April 8th, 2 days  
14 before that Friday, she talked to Defendant  
15 Kamholz. She sent him this letter. She said, hey,  
16 we're going to be there. We're coming. EPA is  
17 coming. Along with that, she sent a records  
18 request. Said here's some records I want you to  
19 start getting ready. Number 1A process flow  
20 diagram. We'll talk about that in a minute. These  
21 are the records that we're going to need.

22      And at that point on April 8th, ladies and  
23 gentlemen, I'd submit to you the proceeding's  
24 pending at that point. Defendant Kamholz knows  
25 EPA's coming. In fact, he's got this now records

1 request. He's got to start getting it ready. In  
2 fact he does. You now have notes, Government  
3 Exhibit 117.09. He starts putting together his own  
4 notes in terms of the response. The proceeding was  
5 pending on April 8th of 2009 I would submit to you.

6 The second element is that the defendant has to  
7 know the proceeding is pending. That we don't  
8 really need to talk about too much. He got the  
9 letter. He talked to Miss Hamre.

10 The third element is the defendant corruptly  
11 endeavored to influence, obstruct, and impede the  
12 proper administration of the law. Corruptly  
13 endeavored, it's a weird term. You're going hear  
14 about it from the Judge. What does "corruptly  
15 endeavor" mean? And I expect you're going hear  
16 that corruptly simply means to have an improper  
17 motive. Improper motive, that's it. So, you've  
18 got to focus on that improper motive.

19 And when you examine all of the circumstances  
20 surrounding this inspection, which we're going to  
21 talk about briefly, when you examine all of that,  
22 you'll get -- as Mr. Personius said, you'll get the  
23 rest of the story. You'll get the improper motive.  
24 It's clear. There's no question, I submit to you  
25 that Defendant Kamholz acted with an improper

1 motive.

2 First we've got -- prior to -- prior to that  
3 instruction, "Hey, Pat we can't let that go off  
4 while they're here", prior to that instruction  
5 there is a folder that we know now which was seized  
6 after the fact, but we know it was in his office.  
7 That folder, you'll have it. You'll have the  
8 actual folder with you. It says Clean Air  
9 Coalition on the top. You saw it.

10 It's got an article in there from 2005. Talks  
11 about benzene into the air. You heard about a 2008  
12 inspection by Mr. Caracci, again a month ago. He  
13 was looking for sources of benzene. He's trying to  
14 have a dialogue with Defendant Kamholz. Defendant  
15 Kamholz gives him nothing. And then now, with this  
16 letter, April 8th, EPA's coming to town. He knows  
17 EPA hasn't been there in a while. That's swirling  
18 in his mind. That's prior to his comment.

19 Now, just after the comment in the opening  
20 conference Miss Hamre testified that Mark Kamholz  
21 specifically said there's no pressure release  
22 valves. We don't have any. In fact, we're coke  
23 oven gas deficient.

24 You heard the testimony. If they're coke oven  
25 gas deficient, this thing wouldn't be going off

1 thousands of times. He passed out this flow  
2 diagram. He gives this to the regulators. He has  
3 that choice. He could put on there, hey, we've got  
4 this pressure release valve. He doesn't do that.  
5 There's no notice on this. There's no mention of  
6 the pressure release valve.

7 You heard testimony of the inspectors from  
8 Miss Hamre, Mr. Patel. He didn't want to answer  
9 any questions about this when it came up during the  
10 inspection. In fact, at one point you heard  
11 testimony that he denied knowing how long it had  
12 been there.

13 And you heard that he got Pat Cahill to talk  
14 about the bleeder. That's consistent with his own  
15 notes which are now in evidence on April 21st, 2009  
16 in the a.m. "Got Pat to talk about plant pressures  
17 and bleeder. Took about one week of charts. P.M.,  
18 gave copies of bleeder charts for those dates.  
19 Cheryl arrived." It's in his own notes.

20 So you've got the testimony of Pat Cahill.  
21 You've got, in addition to that, the testimony that  
22 he was mad. He was mad after this because he felt  
23 like he was put on the spot. He felt like  
24 Defendant Kamholz knew how long this had been  
25 there. And you heard from Gerry Priamo, you heard

1 from Anthony Brossack. They corroborate his story.  
2 Cahill came to them and was mad.

3 And you also heard testimony that at the  
4 closing conference there was some discussion of  
5 maybe raising it. And we've already seen that  
6 notation without going back to that by-product  
7 summary of log books, that on May 22nd they did  
8 raise it. They only raised it to 110. Now that's  
9 all immediately in -- immediately after this  
10 inspection.

11 But we've also got to weigh the comments that  
12 Mr. Kamholz gave to the EPA. And EPA specifically  
13 asked about the bleeder and specifically says on  
14 Exhibit 126 page 12 and 13, give us all this  
15 information about the bleeder. This is what we  
16 want to know. And with respect to number F and  
17 number E -- or E and F, these are very specific  
18 questions. So what you have to do is when you  
19 weigh whether he had an improper motive, whether he  
20 corruptly endeavored, look at his response. So he  
21 sends it. This is now Government Exhibit 127.  
22 This is page 6 and 76 of that response.

23 Now he mentioned first, I've got to note, he  
24 mentions he consulted P. Cahill. If you remember,  
25 my recollection is during the cross-examination Pat

1 Cahill said after this, he never spoke to -- never  
2 spoke to Defendant Kamholz about the bleeder. It  
3 never came up. Defendant Kamholz never talked to  
4 him, and he never talked to -- vice versa. And it  
5 goes down. That F, the last word, "de minimus",  
6 and he's -- the question is so explicit as to  
7 report -- if you've not reported this in the past  
8 five years -- let's go back. "Explain whether  
9 you've reported this coke oven gas emissions as  
10 deviations to your Title V permit. If your answer  
11 is yes, provide copies for the past five years. If  
12 your answer is no, explain why such emissions are  
13 not reported."

14 He says they're not reported because he  
15 believes they're de minimus. You heard the  
16 testimony of Harish Patel, who, based on the  
17 calculations in here and what he knew of this  
18 pressure release valve, in a given year was  
19 173 tons of coke oven gas in the atmosphere.

20 You can use your own common sense, is that de  
21 minimus? But you also have his own handwriting  
22 this was a deliberate thought out response. This  
23 isn't something he just typed up quick on his  
24 computer. You've got his handwritten notes. This  
25 is Government Exhibit 116.01.07, page 6. Take a

1 look at this. You're going to have this original.

2 You can take a look at what's crossed out there.

3 I'd suggest to you -- again, it's my reading --  
4 it looks like currently. He knew how to answer  
5 these questions. He chose to deceive. He chose  
6 the path of deception.

7 Now, you have to evaluate these actions in  
8 evaluating this improper motive, this corruptly  
9 endeavored into now everything that we now about  
10 this case. Everything. The battery flare stack we  
11 talked about when I started. In that same  
12 response, I'm not going to go through it, it said  
13 specifically tell us all the times in the past five  
14 years the pilot light's been out.

15 It doesn't get any clearer than that. He  
16 doesn't say. He doesn't say oh, by the way, you  
17 know, we've had a pilot light problem for 15 years.  
18 No, he could have. He could have chose to comply.  
19 He chose to deceive. You've got to look at  
20 everything in making that evaluation of whether he  
21 had an improper motive. Think about the comment he  
22 made to Dan Heukrath who you heard on the stand  
23 who, he was concerned. He started hearing about  
24 benzene in the air, and he says hey, Mark what's up  
25 with this benzene? And his response is well, you

1 know, there's no upper limit on how much benzene we  
2 can release into the air. He's chosen again to  
3 deceive his own employees. How about the comments  
4 to Anthony Brossack. This relates to the quench  
5 towers versus quench stations, which you've heard  
6 there's no difference. There is no exemption for a  
7 quench station to not have baffles when they were  
8 talking about the towers. Or how about Gerry  
9 Priamo when he talked about hey, there's no baffles  
10 in here. Oh, it's okay.

11 You heard about how he escorted the regulators  
12 around. He had the choice. He knew where they  
13 would go, what they would do, and controlled, in  
14 essence, what they could see.

15 Now, based on all of that I'd submit to you  
16 there's no question that Defendant Kamholz, when he  
17 gave that instruction to Pat Cahill, he knew what  
18 he was doing, and it was for a specific purpose so  
19 that they did not find out about this bleeder.

20 Now in the defendant's opening Mr. Linsin, you  
21 heard this term a "stacked regulatory deck". That  
22 struck a nerve with me. Because now you have the  
23 evidence in the case. Now you have everything  
24 presented to you. Soon you're going to go into the  
25 room, and you're going to get carts of exhibits.

1       But what does the evidence show in this case? Who  
2       was the deck stacked against? 1978 they ask for an  
3       exemption from pushing controls. 1984 they ask for  
4       an exemption from the number one tower. They don't  
5       use it -- they use it less than 10 percent of the  
6       time. 1996 they say they're going to modify the  
7       height of the tower.

8           I submit to you the deck was stacked. It was  
9       stacked against the government based on the years  
10      of deception, the years of noncompliance that the  
11      defendants have now put forth, and the government  
12      has put forth through evidence submitted to you,  
13      and that for the counts in the indictment, Counts 1  
14      through 19, they made that simple choice to not  
15      comply and to deceive. That simple question. And  
16      I submit to you based on the body of evidence you  
17      now have, there is no doubt that the defendants are  
18      guilty as charged to all of the counts of the  
19      indictment.

20           Again, thank you for your time.

21           THE COURT: Okay, Mr. Mango, thank you.  
22      We'll take a break now, ladies and gentlemen.  
23      We'll resume again at 3:00 o'clock, and you'll hear  
24      the closing argument from Mr. Linsin, okay?

25           Don't discuss the case, please. Please keep

1 your minds open. Remember that the closing  
2 arguments are not evidence, but they're there to  
3 persuade you in terms of what the evidence has  
4 shown or not with respect to the 19 counts in this  
5 indictment. Okay. We'll see you in a few minutes.  
6 Thank you.

7 (Jury excused from the courtroom.)

8 || (Short recess was taken.)

9 || (Jury seated.)

10 THE COURT: Welcome back. Please have a  
11 seat. Okay. The attorneys and parties are back  
12 present. You, of course, are here, ladies and  
13 gentlemen, roll call waived. Thank you for paying  
14 the attention that you did to Mr. Mango.

15 And as we explained to you, the second closing  
16 argument, with the same rules to apply, is going to  
17 be given by Greg Linsin, the attorney for Tonawanda  
18 Coke Corporation. Mr. Linsin.

19 MR. LINSIN: May it please the Court --

THE COURT: Certainly.

21 MR. LINSIN: -- Mr. Mango, Mr. Piaggione,  
22 and Mr. Personius, and ladies and gentlemen of the  
23 jury, on behalf of myself and the entire defense  
24 team for Tonawanda Coke, but more importantly, on  
25 behalf of Mr. Saffrin, the president of Tonawanda

1 Coke and all of the employees of Tonawanda Coke, I  
2 want to -- before I begin, I want to thank each of  
3 you for your service, your attention, and your  
4 patience throughout what has been a lengthy trial,  
5 with a lot of dents and complex evidence at times.  
6 I ask your indulgence as I take some more of your  
7 time to offer our perspective on what we think this  
8 evidence has actually shown in this case, and how  
9 we think this evidence should be considered by you  
10 as you begin your duty as judges of the facts.

11 I'm going to try and address three general  
12 topics in my closing summation for you. First I  
13 want to talk a little bit about the concept of  
14 perspective. There has been a lot of detailed  
15 testimony and focus on particular phrases and  
16 particular documents. I want to ask you as you  
17 weigh this evidence, consider it, to put it in a  
18 common sense perspective, to put it in the  
19 perspective that is realistic and meaningful if  
20 you're really going to assess how you should view  
21 and judge and weigh this evidence.

22 Secondly, I am going to address the particular  
23 counts in the indictment and where we believe the  
24 government's evidence has fallen substantially  
25 short of the heavy burden of proof that they bear

1       in this criminal prosecution.

2           And lastly I'm going to address this issue that  
3       Mr. Mango referenced briefly and that Chief Judge  
4       Skretny will instruct you on at a later time  
5       regarding this defense that is called entrapment by  
6       estoppel. It applies to the facts of this case.  
7       It is a defense that you may not have heard about  
8       before, and I want to talk about it specifically  
9       about what the burden is, what the parts of that  
10      defense are, and how we think it actually relates  
11      to the counts in this indictment.

12       So, you've heard nearly a month now of detailed  
13      testimony from 30 witnesses, literally hundreds of  
14      different exhibits entered into evidence. And you  
15      soon will have that task of weighing all of that  
16      evidence, evaluating it, and reaching your verdicts  
17      in this case.

18       But as you begin that task, I want you to  
19      consider one question as a threshold matter.  
20      Virtually every charge in this indictment relates  
21      to a time period 2005 to 2009, essentially a  
22      five-year period of time. But obviously you've  
23      heard a lot of testimony, a lot of evidence about  
24      decades of prior interaction between this company  
25      and Mr. Kamholz and the inspectors and regulators

1 from DEC and in some instances EPA.

2       And you've heard that, ladies and gentlemen,  
3 because it is relevant, it is important to your  
4 understanding and your evaluation of these actual  
5 charges in the counts in the indictment. You need  
6 to look at the actual counts. But I suggest to you  
7 that you also have to weigh the evidence regarding  
8 those counts and test that evidence against the  
9 background of 30 years essentially of interaction  
10 between this company and the environmental  
11 regulators, some of whom you've heard testimony  
12 from and some of whom you haven't.

13       And as I go through those counts, I will  
14 suggest to you how we believe that background  
15 course of conduct, those decades of interaction  
16 really are relevant and should be considered by you  
17 in weighing the charges in this case.

18       Another general perspective issue I think  
19 relates to what Mr. Mango has now reaffirmed as the  
20 government's core theory of motive in this case,  
21 that Tonawanda Coke simply elected to do things  
22 that were not compliant with the environmental  
23 regulations in order to save money, that they made  
24 a choice, business decision, to increase profits  
25 rather than protect the environment.

1           But I ask you to take a look at the overall  
2 fabric of evidence in this case and ask yourself  
3 where is that evidence about the business decisions  
4 that Tonawanda Coke actually made? Mr. Mango  
5 offered and made reference in his summation to a  
6 business plan, and somehow by selecting the clauses  
7 and sentences that he did seem to imply that it was  
8 somehow sinister or improper for a company to  
9 consider the costs of environmental compliance as  
10 it planned for and structured its business  
11 activity.

12           I submit to you, ladies and gentlemen, that  
13 your own common sense tells you that any company in  
14 making plans for how it is going to manage its  
15 assets, how it is going to dedicate and appropriate  
16 its resources has to do precisely that. That is  
17 what a business does. And the reality is -- again,  
18 you can use your common sense -- it does cost money  
19 to comply with environmental regulations.

20           It is not as Mr. Mango suggested that money is  
21 no issue. Money, of course, is an issue. But what  
22 you see in many of the documents -- and a number of  
23 them have been entered into evidence. There's been  
24 testimony from witnesses on this point. The issue  
25 of environmental compliance is not whether it's

1 going to cost money or not. The issue is is the  
2 potential environmental benefit that might be  
3 realized from a certain expenditure worth that  
4 cost? What is the cost benefit, and how does that  
5 factor into whether it should be required under the  
6 regulations?

7 And you'll see that theme woven through many of  
8 the communications. The original discussion about  
9 the exemption for the baffles talks about both of  
10 those points, in the original letter from Tonawanda  
11 Coke and in the response from DEC. This is an  
12 obvious and common sense recognition that you have  
13 to balance those issues and weigh them in  
14 evaluating whether or not costs are warranted.

15 But the other bigger picture here is to take  
16 into account that -- and there has not been  
17 evidence on these points, but I ask you to use your  
18 common sense on this point too, that compliance  
19 with the environmental laws, all of the  
20 environmental laws that you know this company is  
21 subject to, does cost money. This company had to  
22 have expended substantial resources in order to  
23 achieve compliance.

24 We're here on specific charges, and in  
25 evaluating and weighing the evidence based on the

1 government's theory of motive here, ask yourself,  
2 what are the actual costs of compliance for these  
3 charges that relate to these activities that relate  
4 to the charges in the indictment?

5 There's a stipulation that the baffles in both  
6 quench towers, when finally installed, 10 of the 19  
7 counts in this indictment, total cost of \$125,000.  
8 It is real money, as I said in my opening  
9 statement, to any one of us. It is a cost of doing  
10 business to a company that is a going concern and  
11 recognizes that compliance costs have to be  
12 factored into a business plan. It is not a  
13 prohibitive cost. The cost -- again, no direct  
14 testimony on this point.

15 But circumstantially and using your common  
16 sense, think about this pressure relief valve about  
17 which there's been so much testimony. I'll address  
18 this issue of whether it was in the permit or not  
19 or whether it needed to be. But common sense is  
20 going to tell you this is not a big ticket item to  
21 fix or to adjust.

22 The costs of compliance was one that the  
23 company itself undertook by blanking off this valve  
24 in early 2010, and making other accommodations  
25 throughout the plant in order to manage the

1 pressure. This too is not a substantial cost that  
2 reasonably and rationally would drive criminal  
3 misconduct.

4 Lastly, with regard to the RCRA counts, the  
5 management of these hazardous wastes, we know from  
6 the testimony that this concrete pad was installed  
7 in 1994 out in the coal fields. The testimony was  
8 consistent from a number of witnesses that it was  
9 installed because some offsite material was being  
10 brought in, could not be recycled right away, and  
11 was going to be stored on this concrete pad. And  
12 that's what it was mainly used for.

13 Sometimes the K087 from by-products was moved  
14 to the pad before it was mixed. But the reason for  
15 the installation of that pad, the testimony is  
16 uncontradicted, was to store and manage this  
17 offsite waste.

18 So what would be the cost of compliance to the  
19 company for using the pad for mixing of the coal  
20 tar sludge from the by-products or for the material  
21 from the tank for that matter? Absolutely zero.  
22 The pad was already there.

23 So there is a certain degree of illogic and  
24 disconnect in this government's primary theory  
25 about why this company engaged in conduct that the

1 government alleges was a violation. The  
2 government's theory in this regard, we submit to  
3 you, its overarching theory about this case simply  
4 doesn't hold together when the actual costs of what  
5 would be the compliance measures are weighed with  
6 your own common sense and judgment. These are not  
7 substantial issues.

8 I also ask you as a matter of perspective and  
9 judgment as you weigh this evidence to consider  
10 what we submit the evidence has shown to be a  
11 certain degree of cherry picking and  
12 mischaracterization of evidence and integrity of  
13 evidence that is questionable and unreliable that  
14 has been presented to you by the government.

15 And one example I want to offer -- and I didn't  
16 hear Mr. Mango address this in his summation. But  
17 you heard the testimony presented to you by the  
18 government of Pete Dolan and Frankie Gonzalez about  
19 this practice they sometimes engaged in in lowering  
20 the back pressure on the ovens before the 303  
21 inspector would come. And the implication there,  
22 and the point that the government was seeking you  
23 to take from this was, see, this is a company that  
24 is trying to actively deceive the 303 inspectors.

25 But the problem is, and I suggest perhaps the

1 reason Mr. Mango didn't address it in his summation  
2 is that that characterization blew up as soon as  
3 Mr. Priamo took the stand. And Dan Heukrath took  
4 the stand and said, wait a minute, we heard about  
5 these guys that sometimes were tinkering with this  
6 back pressure. That was against the policy that we  
7 were trying to instill in the operation of this  
8 battery. We reprimanded them. Mr. Priamo  
9 testified that he even had to put an extra man on  
10 Pete Dolan's shift to help him properly perform the  
11 sealing and maintenance functions that are required  
12 to help him avoid the shortcuts he was taking.

13 And then you may recall, Mr. Priamo testified  
14 he even had to take away Mr. Dolan's chess set,  
15 because that's what Mr. Dolan was doing on the  
16 battery instead of properly performing his  
17 maintenance activities.

18 That evidence, I submit to you, is unreliable.  
19 It is a mischaracterization. It is a suggestion  
20 that this misconduct by a couple of employees  
21 should somehow be imputed to this company and  
22 company policy. But Mr. Priamo, you may remember  
23 on cross-examination now, a government witness on  
24 cross-examination, made it clear that that -- that  
25 the conduct that was referenced by Mr. Dolan and by

1       Mr. Gonzalez was just that, misconduct, and was not  
2       to be condoned.

3           There was another thread of evidence elicited  
4       from the government's witnesses. You may recall,  
5       and, again, not something Mr. Mango referenced,  
6       about this practice of stopping visitors at the  
7       guard gate. And somehow the inference was to  
8       detain them or defer them from coming into the  
9       plant. But that also misfired when it became clear  
10      from a number of witnesses, and what you can infer  
11      from your own common sense, that that practice is  
12      standard operating procedure at industrial  
13      facilities. It is a mandatory safety requirement  
14      for visitors coming on. Even when a fire chief  
15      comes to a facility, if the guard doesn't  
16      understand the reason for that person being there  
17      or who they may be, they're not just going to  
18      provide free access. You cannot just permit  
19      visitors to stroll around an industrial plant.

20           That evidence too was misapplied,  
21      mischaracterized, and I suggest shows you a  
22      problem, a fundamental problem with the integrity  
23      of the evidence the government has offered.

24           I also ask you to weigh what are certain  
25      logical gaps and holes in the government's

1 evidence, and as you assess the credibility of  
2 particular witnesses and the overall presentation,  
3 ask yourself a couple of these questions, why is  
4 it, for example, that it was the defense that had  
5 to call Gary Foersch as a witness in this trial?  
6 Gary Foersch, who, unquestionably, was the lead  
7 principle contact from DEC with Tonawanda Coke for  
8 30 years. We called him. We called him so you  
9 could hear his testimony. Why is that, ladies and  
10 gentlemen?

11 Why is it also that we called Ken Eng, the EPA  
12 official from New York? Why did we have to present  
13 that evidence to you? And we will return to Mr.  
14 Eng in a few moments about what we think to be a  
15 particularly telling example of EPA's perspective  
16 on this case. I'll come back to that when we  
17 discuss the issues of baffles.

18 These are the kinds of things I'm talking about  
19 though, ladies and gentlemen, when I ask you to  
20 keep all of this evidence in perspective. You need  
21 to drill down, you need to understand the details,  
22 but you also need to understand how those details  
23 fit with what has been a very long history of  
24 interaction by Tonawanda Coke and Mr. Kamholz with  
25 the regulators responsible for overseeing

1 environmental compliance.

2 Let me turn to talk about the particular groups  
3 of charges, and I am going to talk about them in  
4 groups that are contained in the indictment. But  
5 before I do, I need to ask you -- Chief Judge  
6 Skretny will instruct you on this, of course. I  
7 know he has mentioned it a number of times  
8 throughout the course of the trial. But there can  
9 hardly be any more important point here, and that  
10 is as to each and every fact you are asked to  
11 consider, your charge, your duty as jurors is to  
12 ask yourself whether the government through its  
13 evidence from the witness stand has proven that  
14 fact beyond a reasonable doubt. And you will  
15 receive an instruction -- you did receive an  
16 instruction on what reasonable doubt means.

17 But it is that kind of evidence, ladies and  
18 gentlemen, that a reasonable person would not  
19 hesitate to rely or act upon in the most important  
20 affairs of his or her life. That is a very high  
21 burden. And we submit to you that the government's  
22 proof has fallen far short of that standard in a  
23 number of respects that I will be discussing with  
24 you.

25 Now I want to turn first to the first group of

1 counts, Counts 1 through 5 of the indictment  
2 regarding this pressure relief valve. And before I  
3 get into the elements that I want to ask you to  
4 consider particularly there, I want to also ask you  
5 to think about the evidence concerning that PRV in  
6 some perspective. There is no doubt and we can  
7 clear this out, there is no controversy that this  
8 pressure relief valve in the by-products department  
9 was not included in Tonawanda Coke's Title V  
10 application. It was not in its Title V permit.  
11 But the story about that valve doesn't begin there,  
12 as the evidence has shown you.

13       But as you consider that permit, as you think  
14 about what the meaning is that that valve is not in  
15 that permit, we ask you to take a look at that  
16 whole permit, take a look at the level of detail,  
17 the volume of information that is contained in the  
18 permit application and then reflected in the permit  
19 itself. Ask you if that level of disclosure, that  
20 level of detail is consistent with a company that  
21 is trying to hide something important. How does  
22 that fit in context? What does the rest of this  
23 permit tell us? It must tell us something about  
24 how significant or insignificant this pressure  
25 relief valve actually is.

1           Literally hundreds of vessels, tanks, valves  
2 and other components listed in this -- in this  
3 permit application and in the permit itself. Take  
4 a look at it in its entirety as you evaluate this  
5 evidence of the pressure relief valve.

6           The second point and the government put up a  
7 picture -- I'm not going do it. I think we've all  
8 probably seen it enough. If a company was  
9 attempting to hide or conceal or somehow deceive  
10 regulators, would they in their right minds have  
11 placed a pressure relief valve in what could be no  
12 more obvious location in the by-products area than  
13 where it was? The location of that valve itself  
14 tells you something. And clear and obvious I think  
15 is a fair description from whatever angle the  
16 picture is taken, whether it was on the top of the  
17 battery as Mr. Mango's photo was taken, from the  
18 ground itself. The location of this valve tells  
19 you something about the intentions of the company  
20 that installed it.

21           It also tells you something, and we don't  
22 dispute that this 2003 HAPS inventory that  
23 Mr. Mango referenced in his summation, that was not  
24 a supplement to the permit. It was not a request  
25 to change or amend the permit. But there is no

1 doubt that that information, that information about  
2 the pressure relief valve on the coke oven gas  
3 system was explicitly and expressly provided to  
4 DEC, the very regulators that issued the permit,  
5 and then to EPA. Clear as day in the document.  
6 Nonsense, I think not.

7 What does it tell you about the actual  
8 intentions of the person submitting a document like  
9 that? We submit to you that all of this background  
10 information that I've just asked you to reflect on  
11 demonstrates not that Tonawanda Coke was acting in  
12 some way to conceal the presence of this pressure  
13 relief valve, but was acting on a belief, rightly  
14 or wrongly, but acting on a belief that it was  
15 simply not necessary to include this particular  
16 valve in its Title V permit.

17 You saw a number of exchanges between the  
18 company and the regulators about exemptions and  
19 exclusions from permits. And ask yourself, ladies  
20 and gentlemen, whether or not that background  
21 context that I've just outlined for you isn't  
22 suggestive of just that with regard to this valve.

23 We also ask you to consider this pressure  
24 relief valve, not just in the context of the  
25 permit, but in the context of the overall

1 activities of this plant. Where does this valve  
2 fit in terms of comparative and relative  
3 significance for this coke producing facility?

4 You heard testimony that the battery itself, 60  
5 separate ovens, 120 doors with lids throughout the  
6 top of the battery emitted raw coke oven gas 24  
7 hours a day, seven days a week, 365 days a year.  
8 That was understood. It was recognized by the  
9 inspectors. It was expected that the company would  
10 do what it could to minimize those releases,  
11 minimize the leaks of raw coke oven gas. But this  
12 was a recognized function of a properly functioning  
13 coke oven battery. That's part of the context of  
14 this plant.

15 There was also regular monitoring of the stack  
16 emissions from the boiler house and from the waste  
17 heat stack. Tests of actual opacity limits and  
18 components from emissions in these stacks, major  
19 emissions from these stacks. How does that compare  
20 to the 4-inch pressure relief valve in by-products?

21 Also as you're considering this pressure relief  
22 valve you may not -- it may not have registered as  
23 the evidence came in, but I ask you to recall and  
24 take a look at Government Exhibit 92, which was  
25 read -- a portion of which was read into evidence.

1       It was an Air 100 permit issued by DEC in 2000 to  
2 Tonawanda Coke, and it related to a proposal to  
3 deactivate a piece of equipment in the by-products  
4 area, the desulfurizer in the by-products area.  
5       And in that document DEC itself took a look at the  
6 potential benefits and trade-offs for deactivating  
7 this piece of equipment, and described -- and these  
8 are its words -- describe the fact that after coke  
9 oven gas is passed through the by-products area in  
10 this plant, it is purified gas. Purified. And the  
11 testimony is uncontradicted that this pressure  
12 relief valve was downstream of this by-products  
13 department.

14       And so, it is simply not logical when you think  
15 of it in this context that Tonawanda for some  
16 reason would have sought to conceal this  
17 comparatively minor emission source from DEC itself  
18 when that agency has described it -- the gas that's  
19 flowing at that point as purified gas, and you're  
20 comparing releases from a 4-inch pipe to the  
21 releases that are occurring on a daily and hourly  
22 basis from the ovens.

23       Now, I want to comment on one particular point  
24 that Mr. Mango also made in this regard about the  
25 April '09 inspection, the joint inspection. And he

1 referenced the testimony from Miss Hamre, as you  
2 may recall. Miss Hamre who had taken some notes at  
3 the orientation meeting. And there was a notation  
4 in her notes and you saw -- no, you didn't see it.  
5 A notation in her notes that there was no PRV. And  
6 Mr. Mango in his summation suggested to you again  
7 that this was a statement from Mark Kamholz at this  
8 orientation meeting declaring there's no PRV in  
9 this facility.

10 I submit to you that the testimony of  
11 Miss Hamre was something quite different. The  
12 testimony of Miss Hamre as you may remember is that  
13 when you actually walked through the notes and took  
14 comment in her notes in context that she was  
15 talking and referencing a discussion about the  
16 battery, a location where there was no pressure  
17 relief valve. Who in his or her right mind, when  
18 sitting and meeting with a group of EPA and NEIC  
19 inspectors, knowing there's this pressure relief  
20 valve on the coke oven gas line out in by-products,  
21 knowing that seven years -- six years previous  
22 you've submitted a statement saying, hey, we have a  
23 PRV up here, who in their right mind would sit  
24 there and say no, no, there's no PRV anywhere in  
25 this plant? That is a mischaracterization of the

1       testimony. It is a characterization, I submit to  
2       you, that flies in the face of common sense.

3           Now, let me talk about some of the particular  
4       elements that the government is required to prove  
5       beyond a reasonable doubt for each of these five  
6       counts that relate to the PRV, and I'm actually  
7       going to be talking about one count -- one of the  
8       elements, but a couple of issues with regard to  
9       that element. And as Mr. Mango said, we can talk  
10      about these counts in a group, because they're  
11      really just broken up by year, '05, '06, '07, '08,  
12      '09. The elements are going to be the same.

13           You may recall that when Mr. Carlacci testified  
14      and Mr. Sitzman testified, two of the  
15      representatives from DEC's air emissions office, I  
16      asked them a number of questions regarding the  
17      regulatory definition of an emission source and  
18      emission point. And both of them acknowledged and  
19      agreed that those are two different concepts under  
20      the regulations. Both of them agreed that -- and  
21      you will be given a definition in the Court's  
22      instruction on this point. An emission source  
23      under the definition, it's true it does say machine  
24      or apparatus, but it is a machine or apparatus  
25      causing an emission. That's what a source is.

1           An emission point -- and both witnesses agreed  
2       on these definitions -- an emission point is a  
3       conduit, a chimney, a duct, a vent, a flu, or an  
4       opening of any kind through which emissions are  
5       released into the atmosphere.

6           The testimony in this case, ladies and  
7       gentlemen, is uncontradicted that to the extent  
8       anything was released through that pressure relief  
9       valve, the cause, the cause of that release was  
10      either the mechanism in the ovens themselves that  
11      were reversing and causing a backup in the  
12      pressure, or the exhausters that were situated in  
13      the by-products department which created pressure  
14      on that point of the line. The testimony is  
15      uncontradicted that this pressure relief valve was  
16      nothing more than a passive conduit, a passive vent  
17      through which releases were caused by other  
18      components in the facility.

19           This is the literal language of the  
20      definitions. It is a common sense application of  
21      those definitions to the terms that are charged in  
22      each of these five counts. If the government  
23      hasn't proven beyond a reasonable doubt that the  
24      pressure relief valve is an emission source, their  
25      proof on these counts, on each of the counts fails.

1           You also may recall in the direct testimony of  
2 both Mr. Carlacci and Mr. Sitzman there was  
3 testimony from both of those witnesses that, yes,  
4 this valve should have been included in the permit.  
5 Failure to include this valve in the permit was a  
6 violation of condition four of the facility's  
7 Title V permit. That was about as deep as the  
8 analysis went on direct examination.

9           But you may remember on cross-examination we  
10 called up condition four, and we actually asked the  
11 witnesses to walk through what condition four  
12 actually says. And, ladies and gentlemen, that's  
13 what you need to do too. Because the indictment  
14 charges that the operation of this valve was a  
15 violation of that condition. And if you remember,  
16 condition four in the permit says that if, if an  
17 emission source was the subject of permitting  
18 requirements under the New York regulations at the  
19 time of construction or modification, then it  
20 needed to be put in the permit.

21           You may remember that neither Mr. Sitzman nor  
22 Mr. Carlacci had any idea, had not inquired, had  
23 not asked the company when this valve was  
24 constructed. And by the way, is it surprising that  
25 when asked at the joint inspection of April of

1       '09 that Mr. Kamholz didn't know when this valve  
2 was constructed? Not a single witness who's  
3 testified here knew when that valve was  
4 constructed. But certainly not the government's  
5 witnesses who were asked to apply this regulation.  
6 They had no idea when it was constructed, either of  
7 them.

8           Mr. Carlacci, when I asked him well, so when  
9 was this valve modified? Do you know when it was  
10 modified? He testified he did not know. And we  
11 talked a little bit about the definition of  
12 modification. And I walked him through what's in  
13 that language, and the Judge will give you that  
14 language as well.

15           But the modification is very -- the definition  
16 is very specific. It means a physical change in  
17 the method of operation of an incinerator, that's  
18 not this situation, or a stationary combustion  
19 installation, that's not a PRV, or a process. And  
20 if you may recall, when I asked Mr. Carlacci  
21 whether the PRV was a process, he testified no, it  
22 was not a process.

23           Now, Mr. Sitzman did testify that in his  
24 opinion it was a process, this valve was a process.  
25 And he did testify that any adjustments or changes

1       in the set point would, in his opinion, constitute  
2       a modification. But I ask you to weigh the  
3       government's own evidence on this point. Their two  
4       Clean Air Act witnesses are in direct contradiction  
5       of one another about the literal terms of this  
6       condition that governs these five counts. And when  
7       I asked Mr. Sitzman well, can you show me one other  
8       process in this permit that is confined to a single  
9       valve? He was not able to do it.

10           You will have the ability to look at this  
11       permit. You will look at how processes are treated  
12       in this permit. And I ask yourself using your  
13       common sense, using your good judgment and  
14       intelligence, whether or not the testimony of  
15       Mr. Sitzman holds water on this point. Failing  
16       that, the government's evidence here fails as well,  
17       and fails fatally for each of these five counts.

18           Let me turn then to the next group of five  
19       counts in the indictment, and that would be  
20       Counts 6 through 10, and those relate to the  
21       absence of baffles in this western quench tower,  
22       quench tower number 1. No debate on this issue.  
23       Quench tower number 1 did not have baffles at any  
24       period of time relevant to this indictment. No  
25       real debate -- as we submit the evidence shows, no

1 real debate in 1984 DEC granted Tonawanda Coke an  
2 exemption and said you don't need baffles in quench  
3 tower number 4 [sic], again weighing the cost  
4 benefit analysis of the cost of installing baffles  
5 versus the potential minor benefit that baffles may  
6 achieve.

7 Gary Foersch testified just a few days ago when  
8 we called him to testify, that it was his  
9 understanding that this exemption for baffles in  
10 quench tower number 1 continued until he retired,  
11 which was November of 2009. But it's not just Gary  
12 Foersch's testimony.

13 You may remember that in October of 2009 DEC  
14 sent out a Notice of Violation, one of these NOV's,  
15 about the baffles to Tonawanda Coke. And that NOV  
16 from DEC only talked about the baffles in quench  
17 tower number 2, the eastern baffles, and said  
18 install baffles in that tower.

19 I submit to you, we submit to you that that NOV  
20 from the agency itself signed by Mr. Sitzman  
21 recognizes that even as of October of 2009 the  
22 agency itself recognized that this exemption still  
23 applied to quench tower number 1, even though, as  
24 we all know, it had been inadvertently left out of  
25 the actual Title V permit. There would be no other

1 reason for DEC to only require baffles in quench  
2 tower number 2, unless they recognize that this  
3 exemption was valid and applied, and therefore no  
4 baffles were required for that western quench  
5 tower.

6 Now Mr. Mango made some reference to the  
7 testimony that's been introduced about the  
8 percentage of usage for this quench tower number 1  
9 and whether somehow the testimony is sufficient to  
10 demonstrate that quench tower number 1 was used  
11 beyond this 10 percent limit that is built into the  
12 exemption. I ask yourself, first of all, as you  
13 think about this evidence, why is it that the  
14 government, in producing this evidence to you,  
15 relied primarily upon witnesses who had only  
16 incidental or occasional contact with these  
17 baffles? Why is it that they have clung to those  
18 phrases that these witnesses have given to them,  
19 used alternatively? Why is it that those witnesses  
20 do not recall the testimony -- the fact that was  
21 established through the testimony of other  
22 witnesses that quench tower number 1 during this  
23 relevant time period, '05 to '09, was actually out  
24 of service completely for years, a period of years?  
25 As you consider the evidence that Mr. Mango

1 referenced in his summation, I ask you also to  
2 consider the testimony, again elicited on  
3 cross-examination, from Mr. Dan Heukrath, who  
4 testified directly, yeah, quench tower number 1 was  
5 out of service for several years. It was back in  
6 service around 2008, and he specifically remembered  
7 then that he was instructed by Mr. Kamholz, hey,  
8 we're using this tower again, but remember, we're  
9 not using it more than 10 percent of the time.

10 Mr. Priamo also testified that that quench  
11 tower number 1 was out of service for several years  
12 and was used infrequently even when it was in  
13 service. Mr. Brossack himself said as we recall --  
14 and all of this came out on cross-examination of  
15 these witnesses -- number 2, the east quench tower,  
16 was the one used predominantly. Number 1 was used  
17 only from time to time in the winter to keep the  
18 pipes from freezing.

19 Now that is not evidence you heard referenced  
20 in Mr. Mango's summation, and I suggest to you that  
21 the testimony from those three witnesses alone is  
22 sufficient to demonstrate that quench tower number  
23 1, first of all, was out of service for years  
24 during this relevant time period. We don't know  
25 exactly which ones, but for years. And when it was

1 being used, it was used sporadically and used  
2 infrequently.

3 The weight of the evidence about this usage of  
4 quench tower number 1 demonstrates, we submit to  
5 you, that its usage was consistent with and  
6 compliant with this condition that was placed on  
7 the exemption, the exemption that the agency itself  
8 knew was in effect when it issued its Notice of  
9 Violation in October of 2009, that Mr. Foersch knew  
10 was in effect for quench tower number 1 when he  
11 retired in November of 2009.

12 There's another significant piece of evidence  
13 on this issue that I'm going to ask you to take a  
14 look at, and I think this is the only exhibit I'm  
15 going to be calling up at this point. But could we  
16 have, please, Government Exhibit 3518.04. And go  
17 to the second page of this document and enlarge the  
18 top half please.

19 You may recall that this was an exhibit that  
20 was introduced by the defense when we called Mr.  
21 Eng to testify in our case. Mr. Eng was the chief  
22 of the air resources office in New York. He had  
23 only incidental contact with the air inspections at  
24 this facility, but as of the end of 2009, he  
25 testified that he got a call -- DEC had already

1 issued this NOV I was talking about. And then in  
2 December of 2009 EPA issues its own separate Notice  
3 of Violation, and it requires baffles in both  
4 quench towers. And so Mr. Sitzman calls Mr. Eng,  
5 that's precisely what Mr. Eng said, and Mr. Sitzman  
6 said as is recited in here, "The west quench tower  
7 has a history behind it. In speaking to Larry  
8 Sitzman of the NYS DEC, he said that the state and  
9 TCC had an agreement, parentheses, memorialized in  
10 some letter which Larry will send me a copy of,  
11 close paren, that as long as TCC only uses this  
12 quench tower for backup duty, less than 10 percent  
13 of the time, that the state would not require  
14 baffles."

15 And then we have what I think is a very telling  
16 acknowledgment and a very revealing insight into  
17 the judgments made by EPA in 2009 that directly  
18 resulted in the charges in this case.

19 Mr. Eng wrote, "Although TCC had in its Title V  
20 permit application a request not to have to install  
21 baffles for this quench tower, citing this prior  
22 agreement with the state, the current Title V  
23 permit, paren, which has since expired and has not  
24 yet been renewed, does not acknowledge this  
25 agreement. The state accidentally left this

1 provision out and TCC never caught it."

2 Mr. Eng understands there was an exemption.  
3 He's been told by DEC. There is a letter  
4 memorializing this. He recognizes there was a  
5 mistake in not incorporating it in the very permit  
6 that is the essence of Counts 6 through 10 of this  
7 indictment. And he makes the decision, as  
8 reflected in this memo, a decision that I suggest  
9 reflects a stacked deck mentality on the part of  
10 this agency, an overzealous mentality with respect  
11 to enforcement, a mentality that states we need not  
12 bother with these details. I don't need to wait  
13 until I get this letter from Sitzman.

14 Do you remember Mr. Eng said I never bothered  
15 to follow-up. I never inquired further. No need  
16 to evaluate fairly whether this exemption the DEC  
17 understood still existed was valid and should be  
18 honored. DEC missed it. Tonawanda didn't catch  
19 it. So the Title V permit on its face requires  
20 baffles in quench tower number 1. Let's let  
21 Tonawanda argue itself out of this one if it can.

22 I submit to you that is the mentality that is  
23 betrayed by this email. And it is not a mentality  
24 that is consistent with straight dealing and fair  
25 dealing. It is a mentality that relates directly

1 to Counts 6 through 10 of this indictment. And I  
2 submit to you that the overwhelming weight of this  
3 evidence shows that there was a valid exemption,  
4 that there is no credible evidence that the company  
5 somehow exceeded this limitation during a year's  
6 period of time, because that's what -- that is the  
7 test. Mr. Sitzman said ten percent of the time  
8 over a year's period of time. And that doesn't  
9 mean there couldn't be incidental usages from this  
10 week to that that might extend 10 percent on any  
11 spot check.

12 But the instructions you will get on these  
13 counts will tell you if there was a valid  
14 exemption, then the government's proof has failed.  
15 And we submit to you that's precisely what the  
16 evidence shows you. That with regard to these five  
17 counts of this indictment, the government has  
18 proceeded knowing there was an exemption, just as  
19 Mr. Eng suggested in his memo he was going to do.

20 At a minimum I suggest to you that the evidence  
21 I've just outlined demonstrates there is clearly  
22 and inarguably a reasonable doubt as to whether the  
23 government has proven these counts.

24 Let me talk next about the next group of quench  
25 tower counts, that's Counts 11 through 15, and

1       those are the counts that relate to the eastern  
2       quench tower, quench tower number 2.

3           Now, we can clear, I think, some of the brush  
4       out of the way on these counts. There hasn't been  
5       any contradiction in the evidence that there is  
6       this 1996 letter from DEC that says, hey, look,  
7       we're going to prove you're lowering this quench  
8       tower number 2, but we remind you you've got to  
9       have baffles in that -- in that quench tower. That  
10      letter's there. We don't dispute it. We also  
11      don't dispute that the Title V permit itself states  
12      you have to have baffles in quench tower number 2.

13           But the evidence doesn't really stop there,  
14       because what we also have -- and this is part of  
15       the context that I've asked you to keep in mind as  
16       you weigh that particular evidence with respect to  
17       these counts -- you have a context of interaction  
18       between Gary Foersch and Mr. Kamholz and Tonawanda  
19       for a 13-year period of time.

20           Thirteen years, from '96 when this letter first  
21       goes out approving the lowering of the quench  
22       tower, till 2009, when the joint inspection occurs,  
23       and there is an official recognition that there are  
24       no baffles in this quench tower. What you have and  
25       we submit to you it is very revealing, and you and

1 you alone will be the judges of the credibility of  
2 Mr. Foersch on this. But we submit to you that  
3 Mr. Foersch's testimony is important and  
4 instructive and critical in assessing what that  
5 13-year interval is.

6 Mr. Foersch testified that on multiple  
7 occasions he and Mr. Kamholz had discussions about  
8 whether these baffles were in any way effective or  
9 whether they provided even minimal benefit. And he  
10 testified that he repeatedly agreed with  
11 Mr. Kamholz that they didn't. That they were not  
12 significant, at least in Gary Foersch's mind.

13 He also agreed, as we recall the testimony,  
14 with Mr. Kamholz's point that once you've lowered  
15 this quench tower, the upward velocity is lessened,  
16 and so the risk of particulate matter spreading  
17 beyond the immediate localized area was reduced.  
18 That's a matter of simple physics I suggest to you.

19 Mr. Foersch testified that after this permit  
20 was issued in 2002, he looked up into the quench  
21 tower, he saw there were no baffles up there. He  
22 did say, yeah, I said something to Mark, hey, you  
23 got to get baffles installed. But he also  
24 testified that in his heart of hearts, and I think  
25 this may have been the most sincere aspect of his

1       testimony. In his heart of hearts he knew there  
2       were no baffles in that quench tower. I submit to  
3       you he knew before he even looked up there.

4           Now, there were seven years between the time  
5       that the permits issued and these inspections  
6       in 2009. And we understand, we heard the testimony  
7       just as you did, that during this trial for the  
8       very first time in all the times Mr. Foersch has  
9       been interviewed, and despite the fact that he's  
10      testified previously in the grand jury about these  
11      issues, for the first time in testimony here he  
12      recalled that Mark Kamholz told him oh, yeah, I've  
13      installed baffles in that quench tower.

14       I ask you to weigh that testimony carefully. I  
15      ask you to weigh, first of all, whether it even  
16      makes sense that Mark Kamholz, knowing that there  
17      are no baffles in that quench tower, would tell a  
18      regulator yes, there are. Much like the no PRV in  
19      the by-products department when it's sticking right  
20      up there. Why would he say something like that? I  
21      submit to you, ladies and gentlemen, that that  
22      piece of testimony from Gary Foersch is nothing but  
23      a fig leaf, a fig leaf that permitted him to save  
24      some face in what had to have been a very  
25      embarrassing and difficult position for him.

1           He knew and the record demonstrates that he  
2 interacted with this facility for 13 years after  
3 the 1996 letter, and this was a matter that was  
4 simply not important to him. He communicated that  
5 to Mr. Kamholz. At no time in those 13 years did  
6 he ever tell Mr. Kamholz in any official way, hey,  
7 you got to install baffles in here.

8           And the course of conduct, we submit to you,  
9 shows that this agency, DEC through the person of  
10 Gary Foersch, knew there were no baffles in that  
11 second quench tower and simply accepted it,  
12 regardless of what the literal language in Title V  
13 permit was. That's what this evidence shows.

14           He exercised his discretion and the company and  
15 Mr. Kamholz reasonably relied on the interaction of  
16 the regulator that was assigned to them in  
17 interpreting and understanding what were the real  
18 requirements of this permit.

19           Now I'll come back to these five counts when we  
20 talk about the entrapment by estoppel defense.

21           Let me turn now to the RCRA counts. And I want  
22 to say I'm not going to be specifically addressing  
23 in my summation this Count 16, the obstruction of  
24 justice count. Mr. Personius will be talking to  
25 you directly about that. But before I move on to

1       RCRA, I want to say to you it is imperative with  
2       that count as well that you take a look at that  
3       evidence in context. Take a look at that evidence,  
4       not just the moment that is looked at under a  
5       microscope in this exchange between Mr. Cahill and  
6       Mark Kamholz. But look at it in a broader context  
7       that we submit to you is important in evaluating  
8       what that interaction actually meant and what it  
9       didn't mean.

10           The RCRA counts and I'm going to talk about  
11          them in somewhat reverse order. I'm going to talk  
12          about Count 19 first, because Count 19, as you may  
13          remember, relates to the overall management of this  
14          K087 material that was the material generated from  
15          the ongoing process. I'll talk about 17 and 18 in  
16          a minute, the material from the tanks.

17           As we -- as you consider these counts, I ask  
18          you to look at 20 years of history that Mr. Mango  
19          did not say a single word about. Mr. Mango  
20          referenced the testimony of Mr. Flax and  
21          Mr. Strickland. But as you know, the testimony,  
22          the evidence about these RCRA issues at Tonawanda  
23          goes back to the '80s. It goes back to the '80s,  
24          and in order to understand what actually was meant  
25          and what was required and what was understood by

1 Tonawanda in 2009, you've got to go back to the  
2 history of the regulatory interaction regarding the  
3 very activities that are the subject of these  
4 counts.

5 And what that evidence shows, no dispute,  
6 uncontradicted evidence that in '86, Tonawanda  
7 through the person of Mark Kamholz notified EPA,  
8 hey, we generate this K087 here and we recycle it.  
9 They repeated that notification two years later in  
10 1988. And they say, yes, we generate more than  
11 they even said at that point. We are a  
12 large-quantity generator. We generate more than a  
13 thousand kilograms a month. But we recycle it.

14 The very next year you have a DEC RCRA  
15 compliance inspection, and you may recall seeing  
16 the report of that inspection that goes into some  
17 detail, handwriting out in the margins and all over  
18 the form about this recycling activity.

19 Now, I concede to you that that report doesn't  
20 precisely say well, this recycling occurs by the  
21 placement of this K087 on top of the coal piles in  
22 the coal field. Those words are not in there. But  
23 as you look at that report, as you evaluate what is  
24 being communicated there, recognize that this  
25 inspection in '89 is five years before there was

1 any concrete pad at this facility. It is the very  
2 first RCRA compliance inspection this facility has  
3 had. The first inspection. The facility has an  
4 EPA generator ID number. They've told the  
5 authorities we generate K087. The purpose of this  
6 inspector going to the facility is to understand  
7 how this facility manages the very waste material  
8 they've notified that they generate.

9 The report itself on its face tells us the  
10 inspectors stayed at Tonawanda for two hours. Two  
11 hours for this inspection. And that report  
12 concluded, consistent with all of the other RCRA  
13 compliance inspection reports, that Tonawanda was  
14 recycling this K087 into the ovens. There was no  
15 disposal occurring. The plant was properly  
16 qualified, not as a large-quantity generator, but  
17 as a small-quantity generator, because the bulk of  
18 this K087 was being recycled, and therefore didn't  
19 count in that small quantity, large quantity  
20 equation, and that no RCRA permit was required.  
21 Those are the findings consistently in the  
22 '89 inspection report, the '90 inspection report,  
23 the 2001 inspection report, and the 2007 inspection  
24 report.

25 This is the backdrop, ladies and gentlemen, to

1       your evaluation of the testimony concerning the  
2       experts who were offered in this case on the RCRA  
3       compliance issues. The testimony is uncontradicted  
4       throughout these 20 years. From '89 to 2009  
5       Tonawanda recycled the vast majority of this K087  
6       in the precise same manner that is at issue in the  
7       Count 19 and Count 18 of this indictment. By  
8       scooping it up, placing it on the coal piles,  
9       mixing it with the coal and putting it in the  
10      ovens.

11           It defies common sense and flies in the face of  
12       logic and flies in the face of the overwhelming  
13       weight of the evidence to somehow suggest that DEC  
14       over these 20 years simply didn't understand how  
15       this company was recycling this K087. That appears  
16       to be the posture of the government's approach  
17       through this 20 years of regulatory interaction.  
18       There was silence in the government's closing  
19       summation. And you can't fairly and reasonably  
20       weigh the evidence about these counts without  
21       thoroughly and completely understanding and taking  
22       into account that 20-year history.

23           The only thing that changed, ladies and  
24       gentlemen, in 2009 is that a new sheriff came to  
25       Tonawanda Coke in the form of EPA RCRA inspectors.

1       And you may recall the testimony of Mr. Corbett  
2       that when these EPA inspectors came into town, they  
3       didn't bother to look at this regulatory history.  
4       They didn't review the file. They didn't  
5       understand the background or course of interaction  
6       between the company and DEC. They went out to the  
7       facility and Mark Kamholz told them in June of 2009  
8       what I submit the evidence shows that he had been  
9       telling regulators for the 20 years previous. This  
10      is how we were recycling this material. We know  
11      it's why you're here. This is how we do it. And  
12      he told them the exact same thing in June of 2009.  
13      But there were different ears listening, and there  
14      were different judgments being made.

15           He even told them in June of 2009, and by the  
16      way, this material down in the tank, we intend --  
17      we are going to use some of this material to --  
18      excavate some of this material and recycle it in  
19      the same way. And not a single person, not one  
20      person in that group of RCRA inspectors that  
21      visited the facility in June of 2009 said a word.  
22      They didn't raise any issues. They didn't say,  
23      hey, wait a minute, you need to do this  
24      differently. They remained silent, and they knew  
25      it. Not only that this is how they had been doing

1 it, but how they were planning to do it.

2 And now Tonawanda and Mark Kamholz with respect  
3 to Count 18 stand charged with a crime for doing in  
4 Count 18 exactly what they told the RCRA regulators  
5 they were going to do, recycling some of that  
6 material from the tanks on to the coal piles.

7 Let me talk a little bit about the RCRA experts  
8 that you've heard with respect to these counts. As  
9 you know we presented the testimony of Marcia  
10 Williams. I plead guilty, as Mr. Mango has  
11 charged, to sparing you the testimony of yet  
12 another RCRA witness, expert witness. We decided  
13 not to call Mr. Johnson to testify.

14 But focus, if you will, on Miss Williams, and I  
15 ask you as you're thinking about what the testimony  
16 was from these witnesses, as the Judge has told  
17 you, you are to weigh the testimony of these  
18 witnesses just as you would that of any other  
19 person. You weigh to assess their credibility,  
20 whether they appear knowledgeable, whether they  
21 knew what they were talking about. And you're to  
22 rely on that testimony only if you find it to be  
23 credible and reliable.

24 I submit to you that Miss Williams came into  
25 this courtroom and testified in a very credible

1 manner. She was prepared. She had done her  
2 homework. She had read the indictment and knew  
3 what the charges were. She had read the documents  
4 about the case. She had seen photographs of the  
5 facility. She had read testimony that was  
6 introduced in the trial regarding the relevant  
7 witnesses. And I submit to you that she did all of  
8 this before rendering any opinions. And she  
9 explained to you her conclusions that I think are  
10 very important, and I trust will be valuable to you  
11 as you weigh these charges in Counts 17, 18 and 19.

12 She testified that in her opinion this K087 was  
13 not even considered a solid waste under the  
14 regulatory definitions because it was recycled as a  
15 part of a continuous manufacturing process, and  
16 also because it was a secondary material from the  
17 coke manufacturing process that was legitimately  
18 recycled for direct use as a feed stock.

19 But then I asked her, you may remember, all  
20 right, well, assume for a moment this did qualify  
21 as a solid waste. Does it satisfy this other  
22 exemption that you've heard a lot of testimony  
23 about, the regulatory numbers 261.4(a)(10). And  
24 she said in her judgment and in her opinion that  
25 the manner in which this material was recycled,

1 both the K087 and the D018 from the tanks did, in  
2 fact, satisfy that exemption, that it was the  
3 legitimate recycling, and that the mixture of this  
4 material on the coal piles in the coal fields did  
5 not constitute land disposal as that term will be  
6 defined to you by the Court.

7 And she demonstrated an understanding of that  
8 definition, and as you read that definition -- I  
9 will not recite it to you now. You are going to be  
10 asked to interpret those definitions as well  
11 through the filter of your common sense and  
12 judgment. And ask yourselves with respect to the  
13 management of this material from the K087 to the  
14 D087 [sic] what was really going on at this plant?  
15 What were they doing? Were they land disposing  
16 this material?

17 The evidence overall does not suggest that in  
18 any way. And the telling thing I submit, the  
19 telling thing about Miss Williams' opinion is that  
20 her opinion is entirely consistent with the  
21 regulatory opinion that is reflected in the RCRA  
22 compliance inspection reports from DEC from 1989  
23 all the way up through and including 2007. That is  
24 an important piece of corroboration I suggest to  
25 you.

1           Mr. Mango suggested -- I won't go into  
2 detail -- that coal is the same as ground. I think  
3 that suggestion defies common sense. I think it  
4 flies in the face of the testimony. The  
5 recognition from every one of the RCRA experts that  
6 coal in a coke production facility, coal is raw  
7 material. And the testimony from the witnesses who  
8 knew something about it, the testimony was that the  
9 coal in this coal field was anywhere between three  
10 to six feet deep. That's not irrelevant. That's  
11 not what ground is. This is raw material. And  
12 this where this mixture and recycling occurred.

13           Miss Williams understood that. The DEC RCRA  
14 regulators inspected this facility for 20 years,  
15 they also understood.

16           Now, that really touches on both 18 and 19  
17 because the same principles are involved. The same  
18 charge is involved, disposal of hazardous waste  
19 without a permit. Miss Williams said no permit is  
20 required for this legitimate recycling activity.  
21 It is accepted from the definition of solid waste  
22 for all the reasons I've just gone over.

23           Count 17, the one RCRA storage count relates to  
24 this material that's on the ground around the  
25 tanks. And the key element there is this issue of

1       whether that material was actively managed by the  
2       defendants. Because if it was not actively  
3       managed, this abandoned material, material  
4       abandoned by a prior owner, if it was not actively  
5       managed, it is not subject to the RCRA regulations.  
6       So that becomes a key issue for you to grapple  
7       with. And you will get a definition there too from  
8       the judge. Ask yourself as you read through that  
9       definition and as you apply your common sense to  
10      that definition, was it really actively management  
11      when they spread some coke breeze on this just to  
12      harden the surface as Gerry Priamo testified? Was  
13      it active management when they spread some coke  
14      breeze in order to facilitate heavy equipment  
15      moving in that area?

16           Or was there, to the extent there may have been  
17      some incidental movement of this material, was it  
18      just that, incidental to the purpose of what was  
19      really going on? Use your common sense as you  
20      evaluate this concept of active management through  
21      the filter of the definition the Judge will give  
22      you.

23           And by the way, that definition doesn't consist  
24      of one word, as Mr. Mango suggested. It is not  
25      just disturb. Because if you take that to its

1 logical conclusion, somebody walking past a pile of  
2 material on the ground and throwing a rock into it  
3 would have actively managed that material and  
4 subjected it all to RCRA regulation. That cannot  
5 be what the definition means. Common sense tells  
6 us that.

7 In contrast to the testimony of Miss Williams,  
8 and the 20-year history of regulatory interaction  
9 with DEC regarding the management of RCRA regulated  
10 waste, the government offered the testimony of  
11 Mr. Strickland, and then the testimony of Mr. Flax,  
12 and then the rebuttal testimony of Mr. Flax.

13 Mr. Strickland testified when he got on the  
14 stand he had not reviewed the notifications that  
15 Tonawanda had submitted to EPA. He had reviewed  
16 the DEC RCRA inspection report, but he hadn't  
17 bothered to talk to Mr. Fisher, whom he knew and  
18 was the author of that report. And then he said,  
19 and I think this is very telling when you evaluate  
20 the weight to give his testimony, and the  
21 significance with which he evaluated these prior  
22 inspections, he testified as we recall that DEC --  
23 the DEC RCRA inspectors may not have understood how  
24 the mixing was being done. May not have  
25 understood.

1           That, ladies and gentlemen, is nothing more  
2 than a guess. And it is a guess I suggest to you  
3 that flies in the face of the purpose of 20 years  
4 of oversight. And, quite honestly, is an insult to  
5 the integrity of the very RCRA regulators that  
6 inspected this facility.

7           Now Mr. Flax testified twice. When he  
8 testified initially he testified that he hadn't  
9 looked at the DEC inspection reports before 2006.  
10 He was not even aware that there had been  
11 inspection before 1990. He hadn't talked to any of  
12 the DEC inspectors. He didn't review the  
13 investigative statements or trial testimony or any  
14 other statements of witnesses.

15          He also testified in his first attempt at  
16 discussing these issues that there was no need to  
17 go through this business of solid waste. The solid  
18 waste trail, as he phrased it, because K087 is a  
19 listed hazardous waste. And without going into  
20 detail, he reflected I think a tellingly incomplete  
21 understanding even of what the charges were in this  
22 case. He thought there was one RCRA disposal  
23 count. He didn't understand the time period of the  
24 RCRA storage count.

25          He testified the first time he was here, well,

1 I believe that the application of breeze was active  
2 management. But when I asked him he had no idea  
3 why that breeze had even been applied. He didn't  
4 know. He didn't know what the purpose was. He  
5 didn't know why it had been done.

6 But when he testified in rebuttal there were  
7 some pretty significant changes in his testimony.  
8 If you look at Government Exhibit 212, which was  
9 displayed during the closing argument, all of a  
10 sudden now Mr. Flax has a full-blown rationale as  
11 to why this material doesn't satisfy the exclusions  
12 from the solid waste definition. He now had read  
13 the three counts in the indictment, and he had a  
14 thorough rationale as to why K087 and D018 were, in  
15 fact, solid waste under that definition. In fact,  
16 he had also determined that coke is a fuel. But  
17 when I asked him, he couldn't cite to anyplace in  
18 the regulations where it says that.

19 He said between his last testimony -- between  
20 his first testimony and his last he had learned  
21 about this concept of land based management units.  
22 But he concluded, tellingly, consistent with his  
23 earlier testimony, they have nothing to do with  
24 this case, and there's reason to consider them.  
25 They don't bear any relation to this issue of land

1 disposal or what it actually means under the regs.

2 I submit to you, ladies and gentlemen, that  
3 Martha Williams' testimony and her opinions was  
4 simply more credible than the opinions of the  
5 experts offered by the government. And again, at a  
6 minimum, they are reason to have a -- they are  
7 cause to have a reasonable doubt as to whether or  
8 not a permit was required for any of the activities  
9 described in Counts 17, 18 and 19.

10 I'm going to next and finally turn to this  
11 issue of entrapment by estoppel. Chief Judge  
12 Skretny will provide an instruction on this. As I  
13 said a little bit ago, it is probably not a defense  
14 that you've heard of before. But it's been  
15 determined that it applies in this case, and it is  
16 an important defense. It has kind of a fancy name,  
17 but the fact is that the meaning of this defense,  
18 we submit, is very simple and it's very direct.  
19 And it is true that it is the burden of the defense  
20 to establish this defense.

21 But there's a significant difference that  
22 Mr. Mango didn't reference, and that is while the  
23 government's burden in proving these charges is by  
24 proof beyond a reasonable doubt, to establish this  
25 defense, the defendants only need to prove the

1 components I'm about to discuss by a preponderance  
2 of the evidence, and that means 51 percent. That  
3 means proof that something is more likely true than  
4 not. And the elements of this defense which you  
5 will receive in the instruction are that the  
6 government, in this case the DEC and the EPA  
7 inspectors, led the defendants to reasonably  
8 believe that they were authorized to engage in the  
9 conduct that is now the subject of these charges.  
10 That the defendants reasonably relied on statements  
11 or conduct, and that means actions or failures to  
12 act of these government officials. And the  
13 defendants don't have to show that the government  
14 actually authorized the conduct, just that the  
15 government and its agents seemingly or appeared to  
16 authorize the conduct. And that in one way or  
17 another, the defendants reasonably disclosed this  
18 conduct to the government before or at the time it  
19 was authorized.

20 So how does that defense apply to these  
21 charges? Because there's another part of the  
22 instruction, and it is this. This entrapment by  
23 estoppel defense doesn't somehow negate any of the  
24 elements of any one of these offenses. What it  
25 does, and the Judge will instruct you. This

1 applies to Counts 1 through 15 and 17, 18, and 19.  
2 What it does is say this defense recognizes that  
3 even though the government may have proved all of  
4 the elements of a crime or any one of the crimes,  
5 to convict the defendant for acts committed in  
6 reasonable reliance on the conduct of the  
7 government would violate due process and concepts  
8 of fundamental fairness.

9 So even if the government has proven any of one  
10 of these crimes beyond a reasonable doubt, this is  
11 a complete defense and would require you to return  
12 a verdict of not guilty if we have established the  
13 elements I just outlined by a preponderance of the  
14 evidence.

15 With regard to the pressure relief valve,  
16 Counts 1 through 5, as I said, this component in  
17 the by-products department was open and obvious on  
18 this line since at least the 1970s. The DEC  
19 inspectors were at that plant at least -- the air  
20 inspectors were at that plant at least once a year.  
21 And as you consider that information about the  
22 frequency of the visits, take into account also the  
23 testimony that the government wants to emphasize  
24 about how often this valve released. How credible  
25 is it? How believable or plausible is it? If this

1 valve is, in fact, releasing every 30 minutes or  
2 nearly every 30 minutes, how plausible is it that  
3 in all these years no DEC inspector ever happened  
4 to see this thing?

5 In addition, Tonawanda expressly and explicitly  
6 notified DEC and EPA that this pressure relief  
7 valve was there in 2003 in that HAPS inventory  
8 report. Told them it existed. Told them it was on  
9 the coke oven gas line. And then -- and we think  
10 this is very telling evidence. The testimony about  
11 the April 2009 inspection, this air inspection  
12 where there is quite a bit of discussion about this  
13 pressure relief valve where the existence of the  
14 valve is confirmed, where there is discussion with  
15 Mr. Kamholz and Mr. Cahill and the regulators about  
16 how the valve operates, about the fact that it  
17 releases when the ovens reverse, the ovens cause  
18 the release. That the pressure is monitored in  
19 this green shack and here are the pressure charts.  
20 It was known to everyone at that point that this  
21 device, this component, this valve was not in the  
22 facility's Title V permit. That was their  
23 testimony, uncontradicted testimony.

24 And following this week-long inspection from  
25 air inspectors from both DEC and EPA the company

1 was not told, hey, you've got to blank off this  
2 valve. You've got to file an amendment to your  
3 permit. You have to do something to somehow amend  
4 your submissions to the agency. All they were told  
5 was, listen, see what you can do to elevate the  
6 pressure -- the set point for the valve, or  
7 otherwise lower the system pressure in the coke  
8 oven gas line. That was all that was requested of  
9 them by this whole panel of regulatory inspectors,  
10 and that is exactly what they did.

11       If you were asked to do that based on that  
12 information by an official, isn't it reasonable for  
13 you to rely on the indication through that conduct  
14 and those statements that this is permissible as  
15 long as you make the adjustments that I'm asking  
16 you to do. And the evidence isn't in conflict  
17 about this. That evidence is uncontradicted.

18       We submit that this evidence establishes not  
19 just by a preponderance, but very persuasively all  
20 the evidence I've just outlined. That Tonawanda  
21 had reasonably disclosed the existence of this  
22 valve before 2009. That DEC and EPA had at least  
23 seemingly authorized the PRV through their words,  
24 their actions, and their inactions over many years.  
25 And it was reasonable for Tonawanda and Mark

1 Kamholz to rely on that interaction, those  
2 reactions from the regulators.

3 And finally, the last point of this defense is  
4 that to convict Tonawanda for acts committed in  
5 reasonable reliance on this conduct by the  
6 government's representatives would, in fact,  
7 violate fundamental concepts of fairness and due  
8 process. I won't go through all of the details,  
9 but the same principles, ladies and gentlemen,  
10 apply to the consideration for the requirement for  
11 baffles in quench tower number 1. That's the  
12 quench tower that had this exemption. How more  
13 forceful could it be that the regulatory agency  
14 that has had intimate contact with this company for  
15 decades has told the company you have an exemption  
16 for baffles, and so the company doesn't put baffles  
17 in. And now they stand before you charged with  
18 five felony counts. That's not fair. It's an  
19 unfairness that is reflected in the email I showed  
20 you from Mr. Eng, and it is an unfairness that  
21 infects this indictment.

22 With respect to your consideration of quench  
23 tower number 2 and the baffles in quench tower  
24 number 2, the focus of your consideration there  
25 really turns on your assessment of the company's

1 interaction with Gary Foersch over the years that  
2 this was an issue, from '96 all the way through  
3 2009. Thirteen years. Ask yourself what was it  
4 that Gary Foersch really communicated by his words,  
5 by his conduct, his actions, and his inaction?  
6 What did he communicate over those 13 years? And  
7 we submit to you that the evidence is clear that he  
8 communicated baffles in quench tower number 2 are  
9 just not important to me. I'm not going to push  
10 the issue. I know it's in the permit. We all know  
11 it's in the permit. But I'm not going to push  
12 this, and I'm not going to make an issue. And  
13 Tonawanda and Mr. Kamholz relied on that  
14 interaction in believing reasonably that that was  
15 the judgment of the DEC inspector that was sent to  
16 them to oversee compliance with this permit.

17 The same issue on this defense applies to each  
18 of the RCRA counts as well, 17, 18 and 19. What  
19 was reasonable for Tonawanda to understand from  
20 this 20 years of interaction with the DEC RCRA  
21 regulators? The only reasonable conclusion we  
22 submit to you is Tonawanda reasonably understood --  
23 first of all, they reasonably disclosed what they  
24 were doing. They raised their hand and said we've  
25 got this material, we're recycling it. They stood

1 for inspections at least four times in that 20  
2 years, and were told again and again and again and  
3 again you don't need a permit. Your recycling  
4 activity is sufficient. You're a small-quantity  
5 generator and there are no violations.

6 But the new sheriff in 2009 said differently.  
7 EPA assesses this conduct, largely ignores this  
8 regulatory history, and determines with this  
9 stacked deck approach to enforcement that the  
10 concept that is reflected in this indictment that  
11 these were, in fact, criminal violations.

12 But ask yourself these questions, ladies and  
13 gentlemen, not just with respect to the RCRA  
14 counts, but all the counts in this indictment. If  
15 those were in fact criminal violations, why hadn't  
16 DEC on its own previously concluded that these were  
17 serious violations that warranted enforcement  
18 action? What had changed in 2009? The activities  
19 didn't change. The activities didn't change at  
20 all.

21 What changed is we have a new agency coming in  
22 that's going to apply its own judgment and its own  
23 gloss and without proper and fair consideration for  
24 decades of regulatory interaction, make enforcement  
25 decisions that have resulted directly in the

1 charges before you in this indictment. I ask you  
2 to remember as you think about these counts and  
3 this defense, this defense is an absolute defense,  
4 if we've shown it to you by a preponderance, an  
5 absolute defense to Counts 1 through 15 and 17, 18  
6 and 19.

7 Now, I will sit down in a moment, but you're  
8 going to be asked to -- probably sometime  
9 tomorrow -- retire, consider and weigh this  
10 evidence and to ultimately reach unanimous  
11 verdicts. And as you do that, as you reflect on  
12 this duty and your discharge of this duty, I ask  
13 you to keep in mind that our word verdict comes  
14 from an old Latin word, veredictum, which means to  
15 speak the truth. We submit to you that the  
16 evidence in this case shows that the truth is the  
17 government has failed to meet its burden of proof  
18 beyond a reasonable doubt as to each of the counts  
19 I have referenced. The truth is that the conduct  
20 that is the subject of this indictment was known to  
21 and at least tacitly, if not explicitly authorized  
22 by DEC for years. And applying this law to the  
23 facts and using your common sense and your  
24 fundamental sense of fairness, we ask you to return  
25 not guilty verdicts as to each count in this

1       indictment as to Tonawanda Coke. I thank you very  
2       much for your attention.

3                 THE COURT: Okay, Mr. Linsin, thank you.  
4       How's the jury doing, ladies and gentlemen? Doing  
5       okay? Okay. Lets take 15 minutes, and we'll bring  
6       you back in a little bit. Thank you.

7                             (Jury excused from the courtroom.)

8                 THE COURT: Okay. Please have a seat. If  
9       we go until 15 minutes it's 5:00 o'clock, then  
10      we're are running a little bit behind. I'm sorry?

11                 MR. PIAGGIONE: I was going to make a  
12      suggestion. Mr. Mango suggested I not make a  
13      suggestion.

14                 THE COURT: Okay. I watched the jury. I  
15      mean, there was a little bit of a grumble about  
16      coming back in 15. Do you want to go forward,  
17      Mr. Personius, you're next, or should we start  
18      tomorrow morning? It's -- either way is okay with  
19      me.

20                 MR. PERSONIUS: I'm prepared to go  
21      forward, Judge, but I'm concerned that it is  
22      4:40 or 4:45, whatever time it is, and I certainly  
23      don't want to have a situation, if we can avoid it,  
24      where I went and the government would do the  
25      rebuttal in the morning. I don't think that

1       would --

2                     THE COURT: We wouldn't do that. But I'm  
3       concerned about oversaturation, frankly. I mean,  
4       the arguments were a little bit longer than I  
5       expected, and we did get that hour late start. I  
6       mean, this would have been 4:00 o'clock instead of  
7       5:00 o'clock. That would have been a different  
8       story.

9                     You know, the more I look at the charge that I  
10      have to give tomorrow -- and thank you for putting  
11      so much of the burden on me to instruct all these  
12      definitions -- but, you know, be that as it may,  
13      right? It has to be. And I think our discussions  
14      were very productive. You know, Michelle is kind  
15      of tired. And I do want to get some deliberation  
16      in.

17                  But I think what I'll do is I'll call the jury  
18      back out, and I'll suggest to them that we're  
19      willing to go if they want us to go. But, we can  
20      come back, given the length of the arguments,  
21      tomorrow morning and still have a productive day.  
22      Does that work from everybody's standpoint?

23                  MR. MANGO: Yes, your Honor.

24                  MR. PERSONIUS: If the jury were to say,  
25      Judge, we would like to go today, I think we'd go

1       with their desire, as long as Michelle is able to  
2       continue.

3                  THE COURT: You think they'll want to go  
4       today? I mean, continue on today, is that what  
5       you're saying?

6                  MR. PERSONIUS: What I was saying was I  
7       think we leave it up to the jury. The only other  
8       consideration I suggest we weigh is Michelle, and  
9       if Michelle feels good about moving forward too.

10                 THE COURT: Michelle is a marathoner, and  
11       so this is good prep for that. And I'm not  
12       disrespectful of her time. And I don't mean to --  
13       to sound like I am. All right. Let's -- I'll kind  
14       of suggest to the jury that I think we should break  
15       unless there's vehement objection. And then we'll  
16       start tomorrow with the final closing argument and  
17       the rebuttal. Then it will give us a chance to  
18       better fine tune the charge.

19                 Okay. If you're not adverse to that, I think  
20       we'll give that a try, and we'll have the jury back  
21       in in five minutes or so. All right. And then  
22       we'll try to work it that way.

23                 MR. PIAGGIONE: Thank you, your Honor.

24                 THE COURT: All right. Thank you.

25                 (Short recess was taken.)

1                   THE COURT: Okay. The attorneys and the  
2 parties are back assembled. I think I'm going to  
3 amend what I left you with. I don't think I'm  
4 going to give the jury the option of staying. I'm  
5 just going to send them home. And then I'm going  
6 to discuss with you -- if you can stay for a little  
7 bit. One, I think we need to talk about the  
8 verdict form. Because I think in light of the  
9 parties' positions with respect to the  
10 applicability of the entrapment defense by estoppel  
11 we may have to include a reference to that on our  
12 jury form on the respective counts. And so I want  
13 to talk to you about that and any other  
14 modifications, because, frankly, nobody has said  
15 anything about the jury form.

16                  We don't have the definitions yet. I do have  
17 some amendments to the proposed charge, but I need  
18 a little bit of time just to finalize my  
19 discussions with Andrew. And then I'd come out and  
20 give you what we have up to this point in time.  
21 And then we can talk about it tomorrow maybe a  
22 little bit more productively and efficiently. I'd  
23 like to do that. And I'd feel more comfortable,  
24 rather than rush through with a super-saturated  
25 jury, not having enough time to feel totally

1       comfortable with the amendments to the charge, and  
2       then again not doing anything with the verdict  
3       form. Okay.

4           So, I need you to, if you will, have somebody  
5       stay around for maybe an additional 15 or 20  
6       minutes just so I can finish up part of what we  
7       didn't have time to discuss. Is that okay with  
8       everybody?

9           MR. PIAGGIONE: Yes, your Honor.

10          MR. LINSIN: That's fine, your Honor.

11          MR. PERSONIUS: Yes, your Honor.

12          THE COURT: All right. Chris, if you  
13       bring the jury in.

14           (Jury entered the courtroom.)

15          THE COURT: Please don't sit down. Okay.  
16       I think you've sat enough for the day. There was a  
17       lot of information that was presented to you in the  
18       closing arguments. What I'm going to do is adjourn  
19       you for the day, and we would start tomorrow at the  
20       regular time. And, I mean, very honestly, I need a  
21       little bit of time to work with the attorneys.  
22       We've got some issues that will put us in a better  
23       stead to get the case to you as soon as the  
24       arguments are complete. I'm going to have to --  
25       you heard what I'm going to have to do, which is to

1 present you with a lot of definitions, a lot of  
2 information. I want to make sure that I get it  
3 right from your standpoint, and it's going to be  
4 lengthy. So I want you as fresh as you are every  
5 day at the start of the day. Okay. And I don't  
6 want you weighed down because, you know, this -- I  
7 think you'll find when it's all over and with the  
8 charge, it's not going to be burdensome, but it's  
9 going to be a lot of work and tedious to go through  
10 everything and put it into the right perspective so  
11 that you can do your job and get that unanimous  
12 verdict back on the counts that are in the  
13 indictment. And, you know, we all have to do our  
14 jobs as best we can to make that happen.

15 So, if you don't mind, even if you do mind,  
16 we're going to send you home. I say that with some  
17 degree of apology if you were counting on staying.  
18 I guess I must be in another world sometimes.

19 But we'll see you back here -- I've got a  
20 little bit of a lengthier calendar tomorrow, but  
21 I'd like you here at 9:30, and it might be a little  
22 bit later when we start, quarter to ten, in that  
23 vicinity. That's what I'll be shooting for, maybe  
24 ten, but not later than that, okay? If you don't  
25 mind, I'd be happy to see you around 9:30 if I can

1 do it. If not, it's going to be a little bit  
2 later.

3 Be safe on the way home. Don't mess up. Don't  
4 get into any trouble. Come back safe with an open  
5 mind. You're about to start that deliberation, and  
6 we've come a long way together. We'll see you  
7 tomorrow at what time?

8 THE JURY: 9:30.

9 THE COURT: And if it's not exactly 9:30,  
10 about what time?

11 THE JURY: 10:00 o'clock.

12 THE COURT: Okay. So long. Thank you  
13 very much. Appreciate it.

14 (Jury excused from the courtroom.)

15 THE COURT: Okay. So, I do want you to  
16 take a look at the verdict form, and what I'm  
17 suggesting is that we'll probably have added on to  
18 each one of the counts except 16 the language to  
19 the effect that if you are unanimous in your  
20 verdict with respect to satisfying the elements of  
21 the charge beyond a reasonable doubt, you know, the  
22 next question would be, you know, how do you find  
23 with respect to whether or not the defendants have  
24 established by a preponderance of the evidence the  
25 estoppel by entrapment defense.

1           And if you are contrary to that, which I see  
2       the government's taking issue with that, I want  
3       some specific authority from you in that regard.  
4       And if there's any supporting authority from the  
5       defense, please, you know, anything along those  
6       lines, that would be helpful. But I think we might  
7       have to go that route. But I'd like some hard  
8       authority if it's there. Unless you disagree.

9           MR. LINSIN: No, no. Your Honor, in  
10      truth, we had not focused -- I had not focused on  
11      the verdict form. I agree with the Court's initial  
12      instincts. We will look for some authority. Are  
13      you suggesting we bring this back to you tomorrow  
14      if we can find it, or are we going forward tonight  
15      to talk about the verdict form?

16           THE COURT: No, we're not going to talk  
17      about it tonight. We're going to talk tomorrow.  
18      What I need is -- I don't have all of the, I don't  
19      think, fully completed the redrafting of the  
20      different parts of the indictment that we talked  
21      about earlier, because we don't have the  
22      definitions and things.

23           MR. MANGO: I'm going to send those.

24           THE COURT: Send those over to us. But  
25      what we do have I need a few more minutes to go

1 over, and then I'll give you the redraft. And  
2 we're going to eliminate all of those intentionally  
3 left blank areas of the charge. I think it will  
4 look better. We'll repaginate and we'll make the  
5 adjustments on the table of contents as well. So  
6 we'll do all of that. That's going to take us a  
7 little bit of time. So if you could hang in there,  
8 say, until 5:30, I think I can have this all fully  
9 reviewed to my satisfaction, and then I'll get it  
10 to you, and you can work on it overnight, and we'll  
11 talk tomorrow. Fair enough?

12 MR. LINSIN: Yes.

13 MR. MANGO: Thank you, your Honor.

14 (Short recess was taken.)

15 THE COURT: Okay. Let me just -- well,  
16 the attorneys are present. And what I've  
17 distributed is our revised proposed charges. And I  
18 just want to reference for you where we made the  
19 changes. And I still have not resolved a couple of  
20 points, and I really want your input on it. We  
21 won't do that today. I prefer to have it tomorrow  
22 when you get a chance to think about it.

23 But if you look at the first three charges, 38,  
24 39 and 40, those are the elements of the offense.  
25 And those are for the broken down groups of counts,

1 I just want to direct your attention to the third  
2 element in the charge for charge number 38 and the  
3 third element in charge number 40. All right. The  
4 third element basically has added the verbiage or  
5 the words from the indictment so that it's  
6 consistent. Okay.

7 Now, I'd like you to take a look at charge  
8 number 39. And I'm not sure that I'm comfortable  
9 with the third element, and I'm cautious about not  
10 adding an additional element to the government's  
11 proof. And if you look at the final line in the  
12 third paragraph, I'm not convinced that that is  
13 articulated just exactly right or that it should be  
14 placed there. It may be okay. But I want to hear  
15 from you on that.

16 The other thought I had in that regard is to  
17 place the wording, if it works, the "in  
18 noncompliance with any applicable exemption"  
19 language after the word "defendant" in the second  
20 line of that paragraph. I almost think it's better  
21 there, but it's a little bit of a distance from the  
22 baffle system. So, see what you think. And I  
23 think we have to maybe discuss that a little bit,  
24 okay?

25 In charge number 46, the second paragraph was

1 added.

2 In charge number 54 you look at the  
3 introductory paragraph to Count 17, there's  
4 language there that references "without a required  
5 permit." The same is true for 18. But I'm not  
6 sure about 19. I didn't include it. I don't know  
7 if it should be, and that's what I want to really  
8 get your input on. And I don't know the answer to  
9 it. So I want you to give some thought to that or  
10 maybe you know right now whether it should be  
11 included, the language without --

12 MR. LINSIN: Well, your Honor, I can defer  
13 my comments to the morning. But the requirement  
14 for a permit is applicable to Count 19 as well as  
15 Count 18. They are both disposal counts. They're  
16 both disposal without a permit. And so my request  
17 initially was to -- all three of these RCRA counts  
18 are premised on the absence of a required permit.  
19 And so I thought a parallel amendment would be  
20 appropriate for each of these introductory  
21 paragraphs.

22 THE COURT: Okay. I wasn't really sure.  
23 So, I'm open to that. I will consider it as  
24 something I will include unless the government  
25 convinces me otherwise tomorrow. So that all three

1       would be identical in terms of the introductory  
2       paragraph referencing without a required permit.

3                    MR. MANGO: Your Honor, the only word I'm  
4       looking at is the "required." I don't know if  
5       that's necessary. So I'll be prepared to discuss  
6       that in the morning. If -- you know, rather it  
7       would just say without a permit. I'll discuss that  
8       tomorrow.

9                    THE COURT: Okay. Okay. And then charge  
10      number 57, the first element has the language with  
11      respect to the actively managed. It's in the first  
12      couple of lines of the paragraph beginning "first"  
13      for Count 17. Okay. That's -- that's where we're  
14      at.

15                  And then we need your definitions, and then I  
16       think that gives us everything we need, right? But  
17       we've got to work on the verdict form as well.

18                  MR. LINSIN: May I make a preliminary  
19       comment on 57, your Honor?

20                  THE COURT: Sure.

21                  MR. LINSIN: My concern with this  
22       formulation is at least as to Count 17 that we are  
23       folding into one element -- we're folding two  
24       elements into one. And it becomes very tricky then  
25       when you make, you know, findings, whether we've

1       got unanimity on one or both and it's -- if the  
2       concept is valid that these are both required  
3       factual elements of the government's burden, I  
4       believe it should be broken out into two separate  
5       elements.

6                   THE COURT: All right. We'll put that out  
7       there for discussion. And maybe some wisdom will  
8       be bestowed upon the prosecution to understand why  
9       that's so important to the defense here without the  
10      fact that -- you know, with the hopes that it won't  
11      be prejudicial to your case from the standpoint of  
12      the way you look at it.

13                  Okay. That's, I think, our best effort at this  
14      point, and then we'll see how the timing goes  
15      tomorrow. I don't want to keep the jury waiting  
16      very long tomorrow. I don't think they expect to  
17      start at 9:30, I mean the way things have been  
18      going. And 10:00 o'clock, we can massage that a  
19      little bit. But, hopefully there won't be too much  
20      that we need to address tomorrow.

21                  All right. It would help maybe if you  
22      talked -- you know, if you could come to an  
23      agreement on this, it would save us a lot of time.

24                  MR. LINSIN: All right.

25                  THE COURT: Thank you. Appreciate it.

1 MR. MANGO: 9:30, your Honor, for us?

2 THE COURT: Yeah. I mean, if you're going  
3 talk in the morning, you might want to get here  
4 earlier. 9:30 is the absolute earliest I'll be  
5 ready, and I really don't think -- I think there's  
6 two or three sentences that I have to get in, so,  
7 but they're not -- well, every sentence is a major  
8 sentence, but they're not as big as some of the  
9 cases are.

10 MR. MANGO: Thank you, your Honor.

11 MR. LINSIN: Thank you, your Honor.

12 \* \* \* \* \*

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATION  
2

3 I certify that the foregoing is a  
4 Correct transcription of the proceedings  
5 Recorded by me in this matter.

6  
7  
8 s/Michelle L. McLaughlin  
9 Michelle L. McLaughlin, RPR  
10 Official Reporter  
11 U.S.D.C., W.D.N.Y.  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25